ANNEX I

(WT/DS160/5 of 16 April 1999)

UNITED STATES – SECTION 110(5) OF US COPYRIGHT ACT

Request for the Establishment of a Panel by the European Communities and their Member States

The following communication, dated 15 April 1999, from the Permanent Delegation of the European Commission to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

My authorities have asked me to submit the following request on behalf of the European Communities and their Members States for consideration at the next meeting of the Dispute

Disputes contained in Annex 2 of the WTO Agreement (hereafter "the DSU"). Such consultations, which were held on 2 March 1999 in Geneva, have allowed a better understanding of the respective positions, but have not led to a satisfactory resolution of the dispute.

Accordingly, the European Communities and their Member States request the establishment of a panel pursuant to Article 6 of the DSU and Article 64:1 of the TRIPS Agreement to examine the matter in the light of the relevant provisions of the TRIPS Agreement and to find that the United States of America fails to conform to the obligations contained in the TRIPS Agreement, including, but not limited to, Article 9(1) of the TRIPS Agreement, and thereby nullifies or impairs the benefits accruing directly or indirectly to the European Communities and their Member States under the TRIPS Agreement.

The European Communities and their Member States request that the panel be established with the standard terms of reference as provided for in Article 7 of the DSU.

ANNEX II

(WT/DS160/6 of 6 August 1999)

UNITED STATES – SECTION 110(5) OF THE US COPYRIGHT ACT

Constitution of the Panel Established
at the Request of the European Communities

Note by the Secretariat

1. At its meeting on 26 May 1999, the DSB established a panel pursuant to the request by the European Communities (WT/DS160/5), in accordance with Article 6 of the DSU (WT/DSB/M/62).

2. At that meeting, the parties to the dispute agreed that the Panel should have standard terms of reference. The terms of reference are the following:

> "To examine, in light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS160/5, the matter referred to the DSB by the European Communities in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

3. On 27 July 1999, the European Communities made a request, with reference to paragraph 7 of Article 8 of the DSU, to the Director-in-charge to determine of the composition of the Panel. Paragraph 7 of Article 8 provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

4. On 6 August 1999, the Director-in-charge composed the Panel as follows:

Chairperson: Carmen Luz Guarda

Members: Arumugamangalam V. Ganesan
Ian F. Sheppard

5. Brazil, Australia, Canada, Japan and Switzerland reserved their rights as third parties to the dispute.

ATTACHMENT 1.1

FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

(5 October 1999)

Table of Contents

I. INTRODUCTION

1. The European Communities and their member States (hereinafter EC/MS) bring this complaint against the United States of America (US) because they consider that certain aspects of the US legislation relating to the protection of copyrighted works are incompatible with the US' obligations stemming from the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

2. While Section 106 Copyright Act gives the right holder of a copyrighted work the exclusive right to reproduce the work, prepare derivative works, distribute copies of the work and to perform the copyrighted work publicly, Section 110(5) Copyright Act provides for two exemptions from copyright protection, which in simple terms can be summarised as follows:

- Under Subsection A, anybody is allowed to perform in his business premises for the enjoyment of customers under certain conditions, without the consent of the copyright holder, copyrighted works other than nondramatic compositions such as plays, operas or musicals from radio or television (TV) transmissions;

- Under Subsection B, anybody is allowed to perform in his business premises for the enjoyment of customers, "nondramatic music" by communicating radio or TV transmissions without the consent of the copyright owner in cases where a certain surface is not exceeded without any practical limitation or above that surface limit by respecting certain conditions as to the number of loudspeakers used.

3. In the view of the EC/MS these US measures are in violation of the US' obligations under the WTO-TRIPS Agreement. In particular, the US measures are incompatible with Article 9(1) TRIPS together with Articles 11(1) and 11*bis*

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5. The EC/MS' economic interests in this matter are significant. According to a study to which the EC/MS will refer to under Part IV, approximately 70% of all drinking and eating establishments and 45% of all retail establishments in the US can play without limitation radio or TV music without the consent of the copyright owner. This demonstrates clearly the potential of Section 110(5) Copyright Act to cause very significant losses of licensing income.

II. PROCEDURAL HISTORY

6. The so-called "homestyle exemption", which textually corresponds to the present subsection A of Section 110(5) Copyright Act, was already contained in the Copyright Act of 1976 which entered into force on 1 January 1978. Subsection B was added to the Copyright Act in October 1998 by the "Fairness in Music Licensing Act". The practical result of the latter amendment consists in a significant extension of the scope of the exemption from copyright protection as compared to the previous "homestyle" exemption.

7. The US notified their laws and regulations governing the protection of intellectual property rights (IPRs) to the TRIPS Council[4] on the basis of Article 63(2) TRIPS and the relevant guidelines[5] adopted by the TRIPS Council. At its meeting of July 1996, the US copyright legislation, together with the copyright legislation of other industrialised WTO Members, was subject to a review carried out in the TRIPS Council in which the EC/MS *inter alia* asked a number of questions to the US concerning copyright protection in the area of copyrighted works to which the US replied in writing.[6]

8. On the bilateral level the EC/MS raised their concerns by means of several diplomatic demarches at various levels, including the political level. Unfortunately, it proved impossible to make any progress to resolve the issues in this way.

9. By a communication dated 26 January 1999[7], the EC/MS requested consultations pursuant to Article 4 DSU and Article 64 TRIPS in conjunction with Article XXII GATT 1994.

10. By communications dated 11 and 12 February 1999 Australia[8] and Canada[9] expressed their desire to join the consultations pursuant to Article 4 (11) DSU. By a communication dated 15 February 1999, Switzerland[10] did likewise. All three requests were accepted by the US.[11]

11. Consultations between the EC/MS and the US were held in Geneva on 2 March 1999. Canada participated in these consultations. Prior to the consultations, the EC/MS submitted to the US a number of written questions, to most of which the US replied orally. These consultations did not, however, lead to a satisfactory resolution of the matter.

12. By a communication dated 15 April 1999[12], the EC/MS requested the establishment of a Panel pursuant to Article 64(1) TRIPS and Articles 4(7) and 6(1) DSU. The US refused the establishment of a Panel at the meeting of the DSB on 28 April 1999. At the DSB meeting held on 26 May 1999, the Panel was established.

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[3] For the sake of accuracy, it has to be mentioned that the statements referred to under point 4 have been made on the basis of an earlier proposal (H.R. 789 attached as Exhibit EC-13) which provided for slightly wider exception than the one contained in the present Section 110(5) Copyright Act.

[4] WTO Doc. IP/N/1/USA/C/1 and 2.

[5] WTO Doc. IP/C/M/7.

[6] WTO Doc. IP/Q/USA/1.

[7] WTO Doc. WT/DS/160/1.

[8] WTO Doc. WT/DS/160/4.

[9] WTO Doc. WT/DS/160/2.

[10] WTO Doc. WT/DS/160/3.

[11] Note from the Permanent Mission of the United States to the WTO dated 31 March 1999.

[12] WTO Doc. WT/DS/160/5.

13. The terms of reference of the Panel are the following:

> "To examine in light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS 160/5 the matter referred to the DSB by the EC/MS in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[13]

14. Five WTO Members have notified under Article 10(2) DSU their interest in the matter before the panel. These third parties are Australia, Brazil, Canada, Japan and Switzerland.[14]

III. PROTECTION OF COPYRIGHTED WORKS AND THE EXCEPTIONS THERETO UNDER THE US COPYRIGHT ACT

1. Historical background: Section 110(5) Copyright Act before the 1998 amendment ("the homestyle exemption")

15. Under Section 106 Copyright Act (1976), the right holder of a work has the exclusive right to reproduce the work, prepare derivative works and distribute copies of the work. Under Section 106(4) of said Act, the owner of copyright has also the exclusive right *"to perform the copyrighted work publicly"*.

16. In order fully to understand the exemptions contained in the present version of Section 110(5), it is essential to consider its previous version. Prior to 1999, Section 110(5) only consisted of the current Subsection A (minus the words "*except as provided in subparagraph (B)*"). Subsection B was added to the statute in October 1998 by the "Fairness in Music Licensing Act". The 1976 version of Section 110(5) was generally referred to as "the homestyle exemption". It reads as follows:

> *"Notwithstanding the provisions of Section 106, the following are not infringements of copyright:*
>
> *(5) communication or transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:*
>
> *(a) a direct charge is made to see or hear the transmission, or*
>
> *(b) the transmission thus received is further retransmitted to the public."*

17. In broad terms, the homestyle exemption covered the use of a "homestyle" radio or TV in a shop, a bar, a restaurant or any other place frequented by the public. The exemption did *not* apply to venues playing tapes, CD's or other mechanical music.

18. The *ratio legis* of the homestyle exemption goes back to the 1975 US Supreme Court case *Twentieth Century Music Corp. v. Aiken*..[15] Mr Aiken was the owner of a small fast-food restaurant who operated a radio with outlets to four speakers in the ceiling. This installation received the

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[13] WTO Doc. WT/DS/160/6.
[14] WTO Doc. WT/DS/160/6.
[15] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975) (Exhibit EC-1).

transmission of various radio stations which included protected musical works. At that time it was believed that the 1931 *Jewell-Lasalle* Supreme Court ruling[16] meant that a business establishment had to obtain a licence to pick up a broadcast and in order to legally communicate it to the public. However, Mr Aiken had no licence from the right holders of the copyrighted works that were broadcast through the radio on his premises. The Supreme Court exempted Aiken from liability under the 1909 Copyright Act (which is the predecessor of the 1976 Act), as, according to the Court, what he was doing could not be considered as *"performing"* within the meaning of said Act.[17]

19. However, in the Copyright Act (1976), the new definition of *"perform"* clearly covered what Mr Aiken had been doing. In order to keep the "Aiken" activities permissible without the consent of the right holder, a specific provision has been inserted into the Copyright Act to provide users with an exemption from copyright liability.

20. In order to qualify for the exemption, the transmission must be received on *"a single receiving apparatus of a kind commonly used in private homes"*. The benefit of the exemption is lost if a direct charge is made to see or hear the transmission or if the transmission is retransmitted to the public.

21. An important question arises as to what is to be considered *"a single receiving apparatus of a kind commonly used in private homes"*. Technology is under constant evolution and the "household radio" technology of the 70's has been superseded several times, having as a practical effect that the scope of the homestyle exemption has continuously been extended.

22. Although it is clear that, in practice, the homestyle exemption has applied in the past and continues to apply at present primarily to radio and TV broadcasts, and satellite and cable TV, the wording of Section 110(5) Copyright Act (1976) appears in view of the EC/MS to be also applicable to a wider range of transmissions, including computer networks and the internet.[18]

23. The scope of Section 110(5) (in its "homestyle" version) has evolved over the years. At the time of the adoption of the Copyright Act (1976), the intention of the US Congress appeared to be that the scope of the exemption should be narrow and apply only to small commercial establishments "where mom is behind the counter and dad does the cashier".[19] However, the Congressional intent was rather ambiguous, as indicated by the following passage: that *"(i)t applies to performances and displays of <u>all</u> types of works, and its purpose is to exempt from copyright liability <u>anyone</u> who merely turns on, <u>in a public place</u>, an ordinary radio or TV* (…)".[20]

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[16] Buck v. Jewell-Lasalle Realty Co. 283 U.S. 191 (1931).

[17] Under Section 101 US Copyright Act to <u>perform</u> a work means *"to recite, render, play, dance or act it, either directly or by means of any device or process"*, while to <u>transmit</u> a performance or <u>display</u> it is *"to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent"*.

[18] We will come back to this issue when discussing Article 110(5)(B) Copyright Act below.

[19] Compare also reply by the US administration to questions by Canada and the EC/MS within the TRIPS Council, 30 October 1996, WTO Doc. IP/Q/USA/1 at p. 12 with a reference to H.R. Rep. N°1476, 94th Congress, 2d Session 87 (1976) (<u>Exhibit EC-2</u>) *"The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. (…). [T]he Committee considers [the particular fact situation of Aiken] to represent the outer limit of the exemption, and believes that the line should be drawn at this point. Thus the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or TV equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial sound system installed or converts a standard home receiving apparatus (…) into the equivalent of a commercial sound system"*.

[20] See H.R. Rep. N° 1476, 94th Congress, 2d Session 86 (1976) (<u>Exhibit EC-3</u>).

24. According to the statements by the US authorities made in connection with this case, US Courts have also interpreted this provision narrowly: if the receiving equipment and loudspeakers were too sophisticated and powerful, the exemption would not apply.[21] In fact, when looking closely at the vast litigation on Section 110(5) Copyright Act (1976), one does not come to the same conclusion. In these 20 years of litigation, two periods can be distinguished.

25. Until the early 90's, the main elements that Courts took into consideration in this respect were:[22]

- the physical size of the establishment (in terms of square footage, e.g. by comparing with the size of Aiken's[23] restaurant);

- the economic significance of the establishment;

- the number of speakers;

- whether the speakers were free standing or built into the ceiling;

- whether, depending on its revenue, the establishment was of a type that would normally subscribe to a background music service;

- the noise level of the areas within the establishment where the transmissions were made audible;

- the extent to which the receiving apparatus was to be considered as one commonly used in private homes; and

- the configuration of the installation.

As a result of the ambiguous statutory language of Section 110(5) Copyright Act (1976), the selective use of these criteria during a decade of litigation has given rise to a certain degree of inconsistency of the case law.[24]

26. In recent years, rather than to look at the legislative history of Section 110(5) Copyright Act (1976) and the intention of the legislator, Courts started to focparn

32. What has been said on Section 110(5) Copyright Act (1976) above continues to apply to subsection A of the current Section 110(5) Copyright Act with the proviso that the scope of this provision has apparently been limited by excluding nondramatic musical works which are now dealt with in Section 110(5)(B) Copyright Act. However, given that the limitations on the size of the establishment have been greatly relaxed in subsection B, it is doubtful whether Courts will uphold the limit on the size of the establishment, which they have set in the case law on Section 110(5) Copyright Act (1976).[28]

(b) Subsection B

33. Subsection B of Section 110(5) Copyright Act reads as follows:

> *"Notwithstanding the provisions of Section 106, the following are not infringements of copyright :*
>
> *(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or TV broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if -*
>
> *(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs had less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and -*
>
> *liithe esrformance or do a*

> *(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or*
>
> *(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space ;*
>
> *(iii) no direct charge is made to see or hear the transmission or retransmission;*
>
> *(iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and*
>
> *(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed."*

(ba) Exempted uses

34. The exemption contained in Section 110(5)(B) Copyright Act covers transmissions or retransmissions embodying a performance[29] or display[30] of a nondramatic musical work intended to be received by the general public, originated from a radio or TV broadcast station licensed as such by the Federal Communications Commission. This basically covers a situation which appears similar to the one covered by the homestyle exemption, *i.e.* establishments which are open to the public may play radio or TV on their premises for the enjoyment of their customers without the consent of the right owners.

35. A last difference is that Subsection B does not apply to "works" in general but only to "nondramatic musical works", *i.e.* songs, and not to operas, operettas, musicals.

36. While the former "homestyle exemption" and the present Subsection A limit the exemption to the use of a single receiving apparatus commonly used in private homes, this condition is completely absent in Subsection B for cases where the establishment does not exceed a certain size. For all larger establishments the "homestyle" requirement has been replaced by much less stringent conditions in relation to the audio or TV equipment which can be used.

37. Moreover, *retransmissions* which were not expressly exempted under Section 110(5) Copyright Act (1976) are now expressly exempted. Under the US Copyright Act, to "transmit" a program means "to communicate it by any device or process whereby images or sounds are received beyond the place where they are sent".[31] Consequently, to "retransmit" a program means to further transmit a transmission, as is for example the case with cable TV operators, who receive TV signals

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[29] Under Section 101 Copyright Act to perform a work means to recite, render, play, dance or act, either directly or by means of any device or process.

[30] Under Section 110 Copyright Act to display a work means to show a copy of it either directly or indirectly by means of any device.

[31] Section 101 Copyright Act.

and retransmit them to their subscribers, or with satellites, which receive the earth-to-satellite signals and retransmit them to the earth.

38. Most TV programmes in the US are transmitted either by over-the-air broadcast or by cable or satellite. Therefore, the express inclusion of this transmission mode makes TV programmes fully subject to the exceptions in all forms of transmission.

39. It is presumed that Section 110(5)(B) Copyright Act applies in a case of public communication of musical works involving new technologies such as computer networks (e.g. Internet) in view of the wording of this provision. This transmission mode, the importance of which increases from day to day, is now subject to the exemption from copyright protection.[32]

(*bb*) *Exempted users*

40. For the application of the exemption to the establishments other than food service or drinking establishments, the following conditions apply:

- if the establishment has less than 2,000 gross square feet (= 186 square meters), the exemption applies without any further condition, i.e. any audio equipment also of a professional character and any number of loudspeakers can be used;

- if the establishment has more than 2,000 gross square feet of space, the exemption applies under the following conditions:

    - if the performance is by audio means only, it may be communicated by means of a maximum of 6 loudspeakers, of which not more than 4 may be located in any one room;

    - if the performance or display is by audiovisual means:

        - any visual portion of the performance may be communicated by a maximum of 4 audiovisual devices, of which not more than one may be located in any one room. Moreover such devices should not have a diagonal screen size larger than 55 inches;

        - any audio portion of the performance may be communicated by a maximum of 6 loudspeakers, of which not more than 4 may be located in any one room.

41. For food service or drinking establishments[33], the following even more generous conditions apply:

- if the establishment has less than 3,750 gross square feet (= 348 square meters) of space (excluding parking space) the exemption applies without conditions, i.e. any kind of

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[32] The following example is mentioned as an illustration of a situation in which this becomes relevant: an FCC-licensed radio (or TV) broadcaster parallels its over-the-air transmissions on the internet (as an audio back-up to his web-site). These programmes are received by a PC connected with a number of loudspeakers in a bar or other establishment meeting all the conditions set out in Section 110(5)(B) Copyright Act.

[33] Which are defined in Section 101 Copyright Act amended by Section 205 of the Fairness in Music Licensing Act as : "*restaurant, inn, bar, tavern or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is non-residential is used for that purpose, and in which nondramatic musical works are performed publicly*".

audio(-visual) equipment, including professional equipment and any number of loudspeakers may be used;

- if the establishment has more than 3,750 gross square feet of space, the exemption applies under the following conditions:

  - if the performance is by audio means only, it may be communicated by means of a maximum of 6 loudspeakers, of which not more than 4 may be located in any one room;

  - if the performance or display is by audiovisual means:

    - any visual portion of the performance may be communicated by a maximum of 4 audiovisual devices, of which not more than one may be located in any one room. Moreover such devices should not have a diagonal screen size larger than 55 inches;

    - any audio portion of the performance may be communicated by a maximum of 6 loudspeakers, of which not more than 4 may be located in any one room.

42. The exemption applies to "*establishments*" which are now defined by Section 101 of the US Copyright Act (upon amendment by Section 205 of the Fairness in Music Licensing Act) as "*a store, shop or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is non-residential is used for that purpose and in which nondramatic musical works are performed publicly*". This definition also reconfirms the findings of the two Circuit Courts referred to above[34] in relation to Section 110(5) Copyright Act (1976) that in order to meet the copyright exception each individual store, shop or place of business has to be looked at individually, it being irrelevant if a company operates several thousand such places of business all over the US.

(bc) General conditions

43. *No direct charge must be made to the public to see or hear the transmission or retransmission*. This condition also applies to the homestyle exemption. However, this condition has no potential whatsoever to limit the exception, because the operator of the establishment remains completely free to amortise the acquisition and operating costs of the audio(-visual) equipment by charging his customers for the goods and services sold accordingly.

44. *The transmission or retransmission may not be further transmitted beyond the establishment where it is received*. Further transmission or retransmission would of course imply that a new audience is reached, and would thus be a further communication to the public. Thus also this condition has in practice no potential to limit the exception in any meaningful manner.

45. *The transmission or retransmission must be licensed by the copyright owner of the work performed*. This means that the original broadcaster must be properly licensed by the right holder. Given that virtually all radio or TV stations in the Unites States are licensed by performing rights organisations, this condition is also unlikely to have any practical effect to limit the scope of the exemption.

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[34] Compare footnotes 25 and 26.

(c) Summary

46. The exemptions from copyright protection contained in Article 110(5) Copyright Act can be summarised as follows:

As far as copyrighted works excluding nondramatic musical works are concerned, anybody in the US can play such works from radio or TV on his business premises for the enjoyment of his customers without the consent of the copyright owner. The only condition in the law which has the potential to somewhat reduce the benefit of the exception from applying to all business premises in the US, consists in requiring that a single apparatus of a kind commonly found in private homes be used, without defining in the law what is meant by this. The other conditions are unlikely to have any limiting effect in practice.

47. As to nondramatic musical works, anybody can play such works originating from radio or TV in his establishment for the enjoyment of his customers without the consent of the copyright holder. In case the establishment being below a certain size (3,750 square feet for restaurants and bars and 2,000 square feet for all other establishments), no further conditions apply with a potential to limit the number of exempted establishments. In case the premises exceed these size limits, there exist some rather generous limitations in relation mainly to the number of loudspeakers which can be used. In any event, the use of professional equipment is perfectly permissible.

IV. QUANTITATIVE EFFECTS ON COPYRIGHT OWNERS

48. In order to illustrate the scope of the exception, as far as the establishments referred to under Section 110(5)(B) Copyright Act are concerned, and on which no limitations as to the audio(-visual) equipment used exist, the following figures are instructive.

49. On the basis of a 1998 Dun & Bradstreet's "Dun's Market Identifiers Market Profile"[35]

51. To put the results of these data otherwise approximately 70% of all drinking and eating establishments in the US and 45% of all retail establishments in the US are entitled under Section 110(5) Copyright Act, without any limitation, to play music from the radio and TV on their business premises for the enjoyment of their customers without the consent of the copyright owners thus depriving the latter of a significant source of licensing income.

52. All other - larger - establishments are of course benefiting from the exception under Section 110(5)(B) Copyright Act, if they meet the very lenient conditions as to the number of permissible loudspeakers.

V. INCOMPATIBILITY OF THE US LEGISLATION WITH ITS OBLIGATIONS UNDER THE WTO AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

1. Short Negotiating History of the TRIPS Agreement[37]

53. At the Ministerial Conference which launched the Uruguay Round of Multilateral Trade Negotiations at Punta del Este, Uruguay in September 1986, TRIPS was included into the negotiation agenda as one of the so-called new topics. Multilateral rulemaking in the IPR area had been so far dominated by the World Intellectual Property Organisation (WIPO) which administers or co-administers practically all important conventions in this area. There existed at the outset different views between industrialised countries, who wished to achieve a comprehensive coverage of all intellectual property rights and developing countries (LDCs) who wanted to limit work to a Code against trade in counterfeit goods.

54. During the negotiating process the view of those who pursued a comprehensive approach prevailed. This had as a consequence that practically all existing IPRs were included in TRIPS. To start with the principles of national treatment and most favoured nation treatment (the latter being a novelty in the area of IPRs) were stipulated. The most important WIPO conventions (the Paris Convention covering industrial property rights and the Berne Convention covering copyright as well as the Washington Treaty for the protection of semiconductor topographies) were included by reference, also to make these conventions subject to an efficient dispute settlement system. Furthermore extensive rules for the enforcement of the substantive IPR standards were provided, which constituted an absolute novelty for international IPR rulemaking.

55. The so-called Dunkel text on TRIPS of December 1991 became almost verbatim part of the Final Act adopted at the Marrakech Ministerial Conference in April 1994 which successfully concluded the Uruguay Round Negotiations. The provisions of TRIPS became fully applicable to non-developing country Members of the WTO from 1 January 1996 (Article 65(1) TRIPS).

2. Copyright protection under TRIPS

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58. Article 9(2) of the Berne Convention bans the imposition of limitations on, or exceptions to, the reproduction right except in special cases when such limits or exceptions do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. Article 13 TRIPS, which has also to be read together with Article 20 Berne Convention, makes this provision also applicable to all other exclusive rights in copyright and related rights, thus narrowly circumscribing the limitations and exceptions that WTO member countries may impose.

3. Section 110(5) Copyright Act in the light of Article 9(1) TRIPS together with Article 11*bis* (1) and 11(1) Berne Convention

59. For ease of presentation, both Subsections of Section 110(5) Copyright Act will be dealt with together for the legal analysis.

(a) Article 9(1) TRIPS

60. This provision reads :

> *"Members shall comply with Articles 1 through 21 of the Berne Convention and the Appendix thereto…"*

This provision has as a consequence that the obligations contained in Articles 1 through 21 of the Berne Convention have become part of the obligations under TRIPS and are fully subject to the WTO dispute settlement system[38,39]

(b) Article 11*bis* (1) Berne Convention

61. The provision which is of particular relevance for the case at hand is Article 11*bis*(1) Berne Convention which reads:

> *"(1) Authors of literary and artistic works shall enjoy the exclusive right of authorising:*
>
> *(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;*
>
> *(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other that the original one;*
>
> *(iii) the public communication by loudspeaker or any analogous instrument transmitting, by signs, sounds or images, the broadcast of the work."*

62.

Such a means of communication was clearly similar to the public performance of a work, except that it increased the potential audience.

63. Each of the uses described in Article 11*bis*(1)(i) to (iii) Berne Convention is to be considered as a separate use, which requires a separate authorisation for each such use by the owner of the copyright.[40] It is Article 11*bis*(1)(iii) Berne Convention which is the relevant provision for the case of hand.

64. There can be no doubt that communications to the public not only emanating from radio broadcasts but also from TV are covered by Article 11*bis* Berne Convention.[41] There can also be no doubt that under Article 2 Berne Convention[42] that musical works, dramatic, dramatic-musical or other musical works qualify as literary and artistic works. Thus it can be concluded that the works for which Section 110(5) Copyright Act (in both alternatives) denies protection, are protected works under Articles 11*bis* and 2 Berne Convention.

65. While the term public communication[43] has not been defined in the Berne Convention, the Programme for the Brussels Revision[44] provides some guidance as to what is meant by public communication:

> *"…above all where people meet in the cinema, in restaurants, in tea rooms…"*

66. While Subsection A of Section 110(5) Copyright Act refers expressly to *"…performance or display of a work by the public reception…"*, also the communication of a musical work in an establishment to its customers as described in Subsection B of Section 110(5) Copyright Act constitutes a public communication in the sense of Article 11*bis*(1) Berne Convention.[45]

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[40] The underlying reasoning for this is explained in WIPO, Guide to the Berne Convention, 1978, at pp 68-69*: "The question is whether the licence given by the author treason 5l05perforey (" forey Tc 1.86he BT Tw"i1978,210.75 T*

67. Under Article 11*bis*(1) Berne Convention, the public communication has to be "by loudspeaker or any other analogous instrument". In this context, it is irrelevant whether the loudspeakers are incorporated in the radio or TV set or other apparatus (including for example a computer) or if they are separate. It is obvious that the communication to the public envisaged in Section 110(5) Copyright Act covers the case that the musical works are played over loudspeakers to the customers of the businesses. In any event, music transmitted over radio or TV can only be made audible by means of some sort of loudspeaker.

68. By denying copyright protection to musical works (in Subsection A to copyrighted works other than nondramatic musical works) when they are received via radio or TV by hertzian waves and subsequently played on business premises for the enjoyment of customers, the US is not granting the protection which it is obliged to grant under Article 9(1) TRIPS together with Article 11*bis*(1)(iii) Berne Convention.

(c) Article 11(1) Berne Convention

69. This provision reads :

> *"(1) Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing :*
>
> *(i) …*
>
> *(ii) any communication to the public of the performance of their works."*

70. While Article 11*bis*(1)(iii) Berne Convention necessitates that the musical work has been transmitted by hertzian waves at some point during its way to the reception apparatus, Article 11(1)(ii) Berne Convention covers the case when the entire transmission was by wire.[46]

71. The considerations put forward above under Article 11*bis* Berne Convention as to works and communication to the public apply *mutatis mutandis* to Article 11(1) Berne Convention.

72. It can, therefore, be said that the playing of music or other copyrighted works from radio and TV on the business premises for the enjoyment of customers as described in Section 110(5) Copyright Act constitutes acts which are protected by Article 11(1)(ii) Berne Convention if the entire radio or TV transmission is by wire. By denying such protection, the US is violating its obligations under Article 9(1) TRIPS together with Article 11(1)(ii) Berne Convention.

4. Permissible exceptions to copyright protection

73. While the US have at some point in time disputed that a "homestyle radio" is a "loudspeaker or other analogous instrument" in the sense of Article 11*bis*(1)(iii) Berne Convention, they have subsequently exclusively relied on assertions that Section 110(5) Copyright Act would be permissible under exception clauses contained in the Berne Convention and TRIPS. The US have in particular referred to so-called "minor exceptions" under the Berne Convention, to Articles 9(2) and 11*bis*(2) Berne Convention and Article 13 TRIPS.

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performance or display receive it in the same place or in separate places and at the same time or at different times(…).".

[46] See the unequivocal language in WIPO, Guide to the Berne Convention, 1978, at p. 65 which reads: *"the communication to the public of a performance of the work. It covers all public communication except broadcasting which is dealt with in Article 11bis. For example, a broadcasting organisation broadcasts a chamber concert. Article 11bis applies. But if it or some other body diffuses the music by landline to subscribers, this is a matter for Article 11".*

74. The EC/MS would like to observe that the burden to invoke and prove the applicability of an exception fall on the party invoking the exception. This standard is in accord with the Appellate Body reports in United States - Standards for Reformulated and Conventional Gasoline[47] and United States - Measures Affecting Woven Wool Shirts and Blouses from India.[48]

75. In this situation, the EC/MS would like to say that in their view, none of the exceptions to copyright protection contained in the TRIPS Agreement and the Berne Convention can excuse - totally or in part - the exceptions contained in Section 110(5) Copyright Act. The EC/MS will comment in more detail on this issue in light of arguments which the US might wish to submit in this context to the Panel.

5. Nullification and impairment

76. Under Article 64(1)TRIPS, Article XXIII GATT and Article 3(8)DSU, the violation of the US' obligations under the TRIPS Agreement are considered prima facie to constitute a case of nullification or impairment.

VI. CONCLUSION

77. The EC/MS therefore respectfully request the Panel to find that the US has violated its obligations under Article 9(1) TRIPS together with Articles 11*bis*(1)(iii) and 11(1)(ii) Berne Convention and should bring its domestic legislation into conformity with its obligations under the TRIPS Agreement.

[47] WT/DS2/AB/R, p. 22 (adopted on 20 May 1996).
[48] WT/DS33/AB/R, p. 16 (adopted on 23 May 1997).

ATTACHMENT 1.2

ORAL STATEMENT OF THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES AT THE FIRST MEETING WITH THE PANEL

(8 and 9 November 1999)

I. INTRODUCTION

1. The European Community (EC) and its Member States (MS) first of all would like to thank you Ms Chairperson and Members of the Panel for taking on this case in anticipation of the time and effort which you will devote to it. These thanks are extended also to the Members of the Secretariat who assist this Panel in its task.

2. This is the fourth panel on TRIPS and the first one on copyright issues. The findings of this Panel are likely to be of significant importance for the implementation by Members of issues namely in relation to the section on copyright of the TRIPS Agreement and the interrelationship between TRIPS and the Berne Convention.

3. We set out our understanding of the facts of this case and our arguments in the first written submission dated 5 October 1999 in which it is explained why we consider that certain aspects of the US' legislation relating to the protection of copyrighted works are incompatible with the US' obligations stemming from the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). We will refrain today from repeating all facts and arguments made in the written submission, but will rather concentrate on what we consider to be the pivotal facts and arguments. We will also comment provisionally on the First Written Submission of US of 26 October 1999 and Third Party submissions. The EC/MS will of course reply in full to the US and Third Party Submissions in our rebuttal submission.

4. To put it in telegraphic style, the particular situation under US copyright law, which is the object of the EC/MS' complaint, presents itself as follows:

While Section 106 Copyright Act gives the right holder of a copyrighted work the exclusive right to reproduce the work, prepare derivative works, distribute copies of the work and to perform the copyrighted work publicly, Section 110(5) Copyright Act provides for two exemptions from copyright protection, which in simple terms can be summarised as follows:

- under Subsection B, anybody is allowed to perform in his business premises for the enjoyment of customers "nondramatic music" by communicating radio or television (TV) transmissions without the consent of the copyright owner in cases where a certain surface is not exceeded without any practical limitation or above that surface limit by respecting certain conditions as to the number of loudspeakers used;

- under Subsection A, anybody is allowed to perform in his business premises for the enjoyment of customers without the consent of the copyright holder, any other copyrighted works such as plays, operas or musicals from radio or TV transmissions under the condition, in particular, that the equipment used can be considered "homestyle".

5. In the view of the EC/MS these US' measures are in violation of the US' obligations under the WTO-TRIPS Agreement. In particular, the US' measures are incompatible with Article 9(1) TRIPS together with Articles 11(1) and 11*bis*(1) of the Berne Convention and cannot be justified under any express or implied exception or limitation permissible under the Berne Convention or under TRIPS. These measures cause prejudice to the legitimate rights of European copyright owners, thus nullifying and impairing the rights of the EC/MS.

6. The EC/MS' economic interests in this matter are significant. According to a study to which the EC/MS will refer to in more detail, approximately 70% of all drinking and eating establishments and 45% of all retail establishments in the US can play without limitation radio or TV music without the consent of the copyright owner. This demonstrates clearly the potential of Section 110(5) Copyright Act to cause very significant losses of licensing income.

II. PROTECTION OF COPYRIGHTED WORKS AND THE EXCEPTIONS THERETO UNDER THE US COPYRIGHT ACT

1. Historical background: Section 110(5) Copyright Act before the 1998 amendment ("the homestyle exemption")

7. Under Section 106 Copyright Act (1976), the right holder of a work has the exclusive right to reproduce the work, prepare derivative works and distribute copies of the work. Under Section 106(4) of said Act, the owner of copyright has also the exclusive right *"to perform the copyrighted work publicly"*.

8. In order fully to understand the exemptions contained in the present version of Section 110(5), it is helpful to consider its previous version. Prior to 1999 Section 110(5) only consisted of the current Subsection A. Subsection B was added to the statute in October 1998 by the "Fairness in Music Licensing Act". The 1976 version of Section 110(5) was generally referred to as "the homestyle exemption". In broad terms, the homestyle exemption covered the use of a "homestyle" radio or TV in a shop, a bar, a restaurant or any other place frequented by the public. The exemption did *not* apply to the playing of tapes, CD's or other mechanical music.

9. The *ratio legis* of the homestyle exemption goes back to the 1975 US Supreme Court case *Twentieth Century Music Corp. v. Aiken* (full text in Exhibit EC-1). Mr Aiken was the owner of a small fast-food restaurant who operated a radio. This installation received the transmission of various radio stations which included protected musical works. At that time it was believed that a business establishment had to obtain a licence to pick up a broadcast and in order to legally communicate it to the public, but Mr Aiken had no licence from the right holders of the copyrighted works that were broadcast through the radio on his premises. The Supreme Court exempted Aiken from liability under the 1909 Copyright Act (which is the predecessor of the 1976 Act), as, according to the Court, what he was doing could not be considered as *"performing"*

- the physical size of the establishment;
- the economic significance of the establishment;
- the number of speakers;
- whether the speakers were free standing or built into the ceiling;
- the extent to which the receiving apparatus was to be considered as one commonly used in private homes.

20. The exact meaning and scope of the "homestyle" exemption, now under Subsection A of Section 110(5), after the adding of Subsection B to the statute, and preceded by the expression *"except as provided for in subparagraph (B)"*, appears to be as follows.

While Section 110(5) Copyright Act applied to all kinds of copyrighted works before the 1998 amendment, apparently, Section 110(5)(A) Copyright Act is now intended to exclude from its scope "nondramatic musical works" and continues to apply to all other types of works, including e.g. plays, sketches, operas, operettas, musicals, because Section 110(5)(A) Copyright Act refers to "works" in general, while the scope of Subsection B is expressly limited to "nondramatic musical works".

While the EC/MS are pleased to learn that this interpretation is shared by the US (point 9 first written submission), we would nevertheless remark that this interpretation may not the one necessarily followed by all US Courts. There might be Courts which do not draw the *a contrario* conclusion and apply the exemption contained in Section 110(5)(A) Copyright Act to any sort of literary and artistic work.

Exempted uses

21. The exemption contained in Section 110(5)(B) Copyright Act covers transmissions or retransmissions embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated from a radio or TV broadcast station licensed as such by the Federal Communications Commission. This basically covers a situation which appears similar to the one covered by the homestyle exemption, *i.e.* establishments which are open to the public may play radio or TV on their premises for the enjoyment of their customers without the consent of the right owners.

22. A last difference is that Subsection B does not apply to "works" in general but only to "nondramatic musical works", *i.e.* popular music, and not to operas, operettas, musicals.

23. While the former "homestyle exemption" and the present Subsection A limit the exemption to the use of a single receiving apparatus commonly used in private homes, this condition is completely absent in Subsection B for cases where the establishment does not exceed a certain size. For all larger establishments the "homestyle" requirement has been replaced by much less stringent conditions in relation to the audio or TV equipment which can be used; in practical terms, it limits the number of loudspeakers to six. Moreover, communications to the public from *retransmissions* which were not expressly exempted under Section 110(5) Copyright Act (1976) are now expressly exempted.

24. Most TV programmes in the US are transmitted either by over-the-air broadcast or by cable or satellite. Therefore, the express inclusion of this transmission mode makes TV programmes fully subject to the exceptions in all forms of transmission.

25. It is presumed that Section 110(5)(B) Copyright Act applies in a case of public communication of musical works involving new technologies such as computer networks (e.g. Internet) in view of the wording of this provision. This transmission mode, the importance of which increases from day to day, is now subject to the exemption from copyright protection. The following example is mentioned as an illustration of a situation in which this becomes relevant: an FCC-licensed radio (or TV) broadcaster parallels its over-the–air transmissions on the internet (as an audio back-up to his web-site). These programmes are received by a PC connected with a number of loudspeakers in a bar or other establishment meeting all the conditions set out in Section 110(5)(B) Copyright Act. While the EC/MS appreciate that communications over a digital network also involve the reproduction right and distribution right, we are not concerned with these rights in this case.

In this case, we are exclusively concerned with the communication to the public right and nothing in the US first written submission supports in our view the US' assertion (point 16 first written submission) that communications to the public of works where a computer serves as the receiving and amplifying apparatus would not be covered by the exemptions contained in Section 110(5) Copyright Act.

Exempted users

26. The legislator has made a distinction between food service and drinking establishments on the one hand and other establishments on the other. For the application of the exemption to the establishments other than food service or drinking establishments, the following conditions apply:

- if the establishment has less than 2,000 gross square feet (= 186 square meters), the exemption applies without any further condition, i.e. any audio equipment also of a professional character and any number of loudspeakers can be used;

- if the establishment has more than 2,000 gross square feet of space, the exemption applies under the following conditions:

  -

- any audio portion of the performance may be communicated by a maximum of 6 loudspeakers, of which not more than 4 may be located in any one room.

28. The exemption applies to "*establishments*

34.

IV. INCOMPATIBILITY OF THE US LEGISLATION WITH ITS OBLIGATIONS UNDER THE WTO AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

1. Section 110(5) Copyright Act in the light of Article 9(1) TRIPS together with Articles 11*bis*(1) and 11(1) Berne Convention

39. Given that the distinction between both Subsections of Section 110(5) Copyright Act may not be entirely clear, these Subsections will be taken together for the legal analysis.

Article 9(1) TRIPS

40. This provision reads :

> *"Members shall comply with Articles 1 through 21 of the Berne Convention and the Appendix thereto…"*

This provision has as a consequence that the obligations contained in Articles 1 through 21 of the Berne Convention have become part of the obligations under TRIPS and violations of these provisions are fully subject to the WTO dispute settlement system.

Article 11bis(1) Berne Convention

41. The provision which is of particular relevance for the case at hand is Article 11*bis*(1) Berne

Article 11(1) Berne Convention

> *"It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."*

While "countries of the Union" are given the freedom to determine conditions for the exercise of the rights, this freedom is limited by the minimum requirement that a copyright owner obtains as a minimum equitable remuneration. Section 110(5) Copyright Act fails to provide such equitable remuneration.

52.

59. In any event, the three criteria set out in Article 13 TRIPS are not met by Article 110(5) Copyright Act, neither as far as Subsection A nor Subsection B is concerned.

60. Before analysing the three conditions contained in Article 13 TRIPS, a few more systemic remarks on the US argumentation on this issue appears to be necessary.

61. The US give at several places in their first written submission (e.g. points 28, 29) the impression that the exclusive rights contained in the Berne Convention and TRIPS would form a hierarchical order with "important" rights and "unimportant" rights, and refers to the public performance rights contained in Articles 11(1)(ii) and 11*bis*(1)(iii) Berne Convention as "secondary" rights. The EC/MS disagree with this view. Each and every exclusive right stipulated in the Berne Convention and TRIPS are equally important separate rights, which have to be looked at on the basis of theirs respective merits. The relative importance to an individual copyright owner will vary according to the kind of work involved and the way in which he manages his works.

62. From this, it follows that contrary to what the US appear to suggest under points 28 and 29 of their first written submission, it is not possible to argue under Article 13 TRIPS that by increasing the level of protection in relation to one specific exclusive right, it can be justified to reduce the protection of another exclusive right below minimum standard. In other words, one cannot justify a below standard protection for the public performance rights by an above standard protection of the reproduction right. Also Australia underlines in its Third Party Submission (see, for example, point 3.8) that the different exclusive rights granted to a copyright owner have to be looked at separately.

63. Furthermore the US also refer at several instances to agreements between private operators or their associations and associations representing copyright owners (e.g. point 12 first written submission) and claim that these private agreements were similar to what was finally codified by Section 110(5) Copyright Act. While the US have not made available the agreement to which reference has been made, the appreciation of the two leading US collecting societies has been expressed in unambiguous terms in a joint press release by BMI and ASCAP on the day following the passage of the Fairness in Music Licensing Act by Congress of which I will cite only a few passages (the text of the entire press release will be submitted as Exhibit EC-8).

> *"With this music licensing legislation, which seizes the private property of copyright owners, the United States Government has severely penalised American songwriters, composers and publishers… The earnings of songwriters, composers and publishers have been reduced by tens of millions of dollars annually."*

More importantly, the US' argument to refer to private agreements in order to justify provisions of a statute is of a circular nature. It is the task of the law to set the legal framework and to grant certain rights. It is only after the legislator has established this legal framework that the private economic operators can start to act within this framework. Only if the law stipulates a public performance right can the parties usefully agree on a licensing contract. For uses which are free such as the ones contemplated in Section 110(5) Copyright Act there is no object for a licensing contract because there is no right to be licensed in the first place. In its Third Party Submission, Australia points rightly out that the right to obtain remuneration has to be distinguished from a situation in which the right owner elects not to pursue his entitlement (see points 3.12 and 3.13).

64. The US are also making reference to the inherent administrative difficulties to license a great number of small establishments. Logically speaking, questions of enforcement of a right cannot be used to excuse its very existence. One can only enforce a right if it is recognised by the law. European collecting societies are successfully licensing great numbers of also small businesses and do apparently not encounter insurmountable obstacles. In the US, it would appear that if indeed the collecting societies were to encounter administrative difficulties, this is because collection societies

in the US have never developed the necessary administrative structure to licence small establishments due to a lack of legal protection for extended periods of time in the US. The US' argument is further flawed by the fact that Section 110(5) denies protection to copyrighted works emanating from the radio and TV. The playing of copyrighted works from CDs and tapes is not covered by the exceptions. In other words the operators of establishments have to obtain licences to play music from CDs or tapes, but they can play music from the radio or TV without a license. This differentiation is difficult to justify. Either the licensing of a great number of establishments meets insurmountable difficulties, then it should meet these difficulties independently of the medium used or it does not.

65. Let's now look more specifically at the three conditions to make limitations or exceptions to exclusive rights under Article 13 TRIPS permissible:

- They have to be confined to certain special cases;

- They may not conflict with a normal exploitation of the work; and

- They may not unreasonably prejudice the legitimate interests of the right holder.

These three conditions have to be met cumulatively.

66. When the US claim that Section 110(5) Copyright Act confines the exclusion from copyright protection to "certain special cases" (pages 13-14 first written submission) [49], this would appear to the EC/MS rather to be a claim that the exceptions are well defined in the sense of legal certainty. However, nothing is said about what makes the playing of music from the radio and TV for the enjoyment of customers "special" as compared to other cases. One of the questions coming immediately to one's mind is why is the playing of music from the radio or TV "special" as compared to music played from CDs or cassettes. The remark by Australia in its Third Party Submission (see point 5.5) that "… Section 110(5) Copyright Act appears to provide a blanket exemption for such establishments rather than dealing with special cases" comes to the same conclusion.

67. Furthermore, the fact that very significant numbers of establishments are covered by the exception demonstrates that the exemption rather constitutes the rule than the exception in a situation in which one half to more than two thirds of all US establishments are covered by the exception.

68. As to Section 110(5)(A) Copyright Act, the reference to "homestyle receiving apparatus" is in itself so imprecise that it does not even create any legal certainty leave alone precisely defining a "special case" in the sense of Article 13 TRIPS.

The notion of homestyle receiving apparatus is a moving target that is subject to the developments of technology. Today's audio sets which are purchased by ordinary private customers to be played in their homes may have several hundred Watts of output capable of servicing many times the surface involved in the historic Aiken case.

69. The limitations or exceptions may not conflict with the normal exploitation of the work. As pointed out above, this analysis has to be carried out on the basis of each exclusive right individually.

70. Articles 11(1)(ii) and 11*bis*(1)(iii) Berne Convention create an exclusive right for a copyright owner to grant permission for the public performance of his work. While it is difficult to establish with precision what kind of performance to the public would not form part of the normal exploitation of the exclusive public performance rights, it appears in the view of the EC/MS safe to say that at least all uses which create an economic benefit to the users of the works are comprised in the normal

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[49] See paragraphs 24-26.

76. In relation to the analyses prepared by Dun & Bradstreet one branch of the US government may consider them "meaningless by themselves" the fact of the matter is that the 1995 analysis has been commissioned by the US Congress, because some meaningful insight into the effects of the size of an exemption was expected. The 1998 analysis is but a re-run of the 1995 analyses based on 1998 figures. In view of the EC/MS, it is irrelevant to quantify the actual financial losses suffered by the rightholders concerned. It is sufficient to demonstrate the potential of the prejudice suffered.

77. As to the criticism by the US that the EC has made no attempt to address the effects of these exceptions on its rightholders, it is sufficient to say that at least 25 % of all music played in the US belong to EC copyright owners.

78. To sum-up our legal argumentation, Ms Chairperson, Members of the Panel, let me point out the following:

In the view of the EC/MS, which is apparently shared by the US, Section 110(5) Copyright Act is at variance with Article 9(1)TRIPS together with Articles 11(1)(ii) and 11*bis*(1)(iii) Berne Convention.

79. The EC/MS do not agree with the US defence that the exception stipulated in Section 110(5) Copyright Act can be justified under Article 13 TRIPS. In view of the EC/MS Article 13 TRIPS is not applicable to Articles 11 and 11*bis* Berne Convention because both Article 20 Berne Convention and Article 2(2) TRIPS do not allow that TRIPS extends the scope of exceptions allowable under Berne. In any event, no exception to Article 11*bis* Berne Convention could ignore the requirement stipulated in Article 11*bis*(2) last sentence Berne Convention which requires as the bottom line that the rightholder receive equitable remuneration. Such equitable remuneration is not foreseen in Section 110(5) Copyright Act.

80. Finally, even if Article 13 TRIPS would be applicable to Articles 11 or 11*bis* Berne Convention none of its three conditions, which have to be met cumulatively, would be met by either alternative contained in Section 110(5) Copyright Act. Of course, based on WTO precedents, the US bear the full burden of proof to establish that Article 13 TRIPS would be applicable and all its conditions be met.

ii) and 1.1

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ATTACHMENT 1.3

RESPONSES OF THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES TO

Impact on the market

Q.3 Please provide information on the estimated losses to the EC right holders resulting from the exemptions contained in Section 110(5), if possible divided between Subsections (A) and (B) of that paragraph.

It is very difficult to establish precise figures for losses suffered by EC right holders from the operation of Section 110(5) Copyright Act. But in view of the EC/MS, it is not our task to demonstrate such precise figures.

However, in view of having an order of magnitude of losses which European owners of copyrighted works are likely to suffer, the EC/MS would like to refer the Panel to the order of losses for all right holders, which the two major US Collecting Societies have estimated, when the old coverage of the "homestyle exemption" was enlarged by the Fairness in Music Licensing Act in 1998, to represent an amount of "tens of millions of dollars" per year (see Exhibit produced during first substantive meeting and now reproduced as Exhibit EC-14).

The losses to be allocated to EC right holders are the part of these "tens of millions of dollars" proportionate to the EC authors' market share for which we have given estimates in our reply to question 5 below.

This analysis would suggest that the losses suffered by EC authors are, in any event, in the sphere of millions of dollars per year.

Q.4 Please provide any available information or estimations on the revenues collected by the EC collecting societies, in particular:

(a) The total revenues from the licensing of public performance of music divided between the major categories of uses, including:

(i) broadcasting and rebroadcasting within the meaning of Article 11*bis*(1)(i) and (ii) of the Berne Convention,

(ii) public communication within the meaning of Article 11*bis*(1)(iii), and

(iii) other rights, including those referred to under Article 11(1) of the Berne Convention;

(b) As regards the revenues collected from food serving and drinking establishments and other establishments, what is the breakdown as between royalties for the public performance of broadcast music and the public performance of music from other sources;

(c) Breakdown of these revenues between various sources of revenue, in particular the percentage of the revenues collected from small business establishments (e.g. of the type covered by Section 110(5)).

Information or estimations of the revenues collected by all Collecting Societies in the EU in relation to the licensing of the public performance of music under the categories mentioned in this question are not available to EC/MS.

It should be noted by the Panel that the Collecting Societies in the EU do not necessarily categorise the revenues they collect in resplect3dred by EC auth3Dnel thatk8 T58 -0.372580

However, the EC/MS have been able to obtain illustrative information in respect of one EU Member State from the Irish Music Rights Organisation (Imro). Imro is a Collecting Society, which licenses and collects revenue in respect of the public performance of music in Ireland. If one were to extrapolate the quantitative data for Ireland to the level of the EC, Ireland representing roughly one hundredth of the EC's population (3.6 million for Ireland; 370 million for the EC), the Irish figures would have to be multiplied with a factor of 100.

(a) (i) In its financial year, which ended on 31 December 1998, Imro collected revenues in respect of broadcasting and rebroadcasting of music (approximating to the rights provided for in Article 11*bis*(1)(i) and (ii) Berne Convention amounting to IR£ 3,634,594 (€ 4,614,982).

(ii) In the same financial year, Imro collected revenues from the licensing of the public performance of music by means of radio and TV (approximating to the right provided for in Article 11*bis*(1)(iii)) in the amount of IR£ 1,242,210 (€ 1,577,281).

(iii) In the same financial year, Imro collected revenue from the licensing of all public performances of music in the amount of IR£ 6,237,676 (€ 7,920,214). This does not include the revenue collected in respect of the licensing of broadcasting and rebroadcasting (approximating to Article 11*bis*(1)(i) and (ii)) mentioned at subsection (a) above. Excluding the radio and TV public performance revenue, Imro collected IR£ 4,995,466 (€ 6,342,933) in respect of the licensing of all other public performances of music (including those referred to under Article 11(1) Berne Convention).

(b) As indicated above, during its most recent financial year, Imro collected revenues in the amount of IR£ 1,242,210 (€ 1,577,281) in respect of the public performance of broadcast music from food serving and drinking establishments and other establishments. In that same financial year, Imro collected revenues in the amount of IR£ 6,237,676 (€ 7,920,214) in respect of the public performances of music from all sources (including the public performance of broadcast music) in food serving and drinking establishments and other establishments.

(c) Imro estimates that it collected revenue from the licensing of the public performance of music by means of radio and TV in small business establishments amounting to approximately IR£ 861,098 (€ 1,093,369) during its most recent financial year. The categories of establishment mentioned in the Section 110(5) Copyright Act are not the basis used by Imro in identifying revenue from "*small business establishments*". However, in identifying the revenue from small business establishments, Imro has included the revenue collected from retail shops, bars, nightclubs, guesthouses, hotels, restaurants, hair and beauty salons. The revenue collected from these small business establishments for the licensing of the public performance of music by means of radio and TV represented 13.8 % of the public performance revenue collected by Imro in that year.

Q.5 In view of paragraph 77 of your oral statement at the first substantive meeting that 25 per cent of all music played in the US belongs to EC right holders, please provide information about what amount of revenue is transferred from the US CMOs to the EC CMOs for the last three years for which data are available. What is the proportion of this transferred sh1677 ice£ 6,year.

International treaty obligations

Q.8 Please explain which individual exclusive rights under which specific provisions of Articles 11(1) and 11*bis*(1) of the Berne Convention are affected to what extent by which specific provision of Subsection (A) and/or (B) of Section 110(5)?

As pointed out in points 61-72 of our first written submission, and reconfirmed in points 41-46 of our oral statement at the first meeting with the Panel, it is the view of the EC/MS - which is apparently shared by the US, Australia and Switzerland – that both Subsections of Section 110(5) Copyright Act are at variance with Article 11*bis*(1)(iii) and Article 11(1)(ii) Berne Convention.

Both provisions of the Berne Convention cover the same exclusive right, i.e. the communication to the public of a protected work. The distinction being drawn between the two provisions relate to the way (i.e. hertzian waves for Article 11*bis* and through cable for Article 11) in which the works reach the place where they are eventually played to the public (see also the citation from the guide to the Berne Convention cited in footnote 46 of our first written submission). Both Subsections of Section 110(5) allow the playing of music for the enjoyment of customers.

Q.9 Is the potential scope of application rather than the existing actual impact of Section 110(5)(A) and (B) relevant for the examination of its consistency with Article 11*bis*(1) or Article 11(1) of the Berne Convention, as the case may be, or for assessing whether Section 110(5) meets the requirements of Article 13 of the TRIPS Agreement, in particular its second and third conditions ?

In the view of the EC/MS, Section 110(5) is incompatible with Articles 11*bis* and 11 Berne Convention simply because an exclusive right is denied, which according to both Parties is the case. The dichotomy between potential scope and actual impact is, in the view of the EC/MS, of relevance for the three conditions contained in Article 13 TRIPS. This would of course require that Article 13 TRIPS be applicable as an exception to Articles 11*bis* and 11 Berne Convention, something that the EC/MS have repeatedly denied (see also reply to question 11 below).

In the view of the EC/MS, it is the potential impact, which is of primary importance to assess the conditions contained in Article 13 TRIPS. Seen from the right owner, his exclusive right is not only menaced by those who actually perform the acts prohibited by the exclusive right but also by all those who are free to decide to do so at any time and without having to inform him or his Collecting Society of their intentions.

It is the potential, which is created which sets the market conditions. This argument can also be illustrated by reference to another field of IPR. In the patent area, long and acrimonious discussions took place in the Uruguay Round negotiations on TRIPS in relation to compulsory licenses, which generated eventually the disciplines contained in Articles 27(1) and 31 TRIPS.

In the review of the elation7t.1for-.035icgD6to another field of IPR. I9mbF1 ually twiclcarro quim od3cI9mb

the TRIPS Agreement in addition to those protected in Article 1 – 21 of the Berne Convention? Does this conflict with the argument that the three conditions of Article 13 of the TRIPS Agreement can apply in addition to any requirements under exceptions embodied in the Berne Convention?

The TRIPS Agreement has been negotiated, at least from the perspective of the EC/MS, to improve the level of protection of IPRs as compared to the pre-existing situation. Given that the Berne Convention already contained a system of well-defined exceptions to specific rights, there existed no need to define a general exception for all rights covered by Section 1 Part II of TRIPS. If the latter had been the objective, exceptions would have been created for Berne rights, going beyond those contained in the Berne Convention before TRIPS. Such a result would clearly be incompatible with Article 20 Berne Convention and Article 2(2) TRIPS.

The EC/MS negotiating position is well reflected in MTN.GNG/NG11/W/68 (Exhibit EC-17). The proposed text on the draft TRIPS Article on limitations and exceptions (Article 8 of the proposal) allowed Members to provide for limitations, exceptions and reservations in relation to certain related rights as permitted by the Rome Convention. It did not, however, allow to provide for limitations and exceptions to Berne rights. It is interesting to note that the US had apparently the same objective when stating in their submission to the negotiating group (doc. MTN.GNG/NG11/W/14/Rev.1, Exhibit EC-18) that "*Any limitation and exceptions to exclusive economic rights shall be permitted only to the extent allowed and in full conformity with the requirements of the Berne Convention (1971)*".

The argument that the three conditions of Article 13 TRIPS can apply in addition to any requirement under exceptions embodied in the Berne Convention, is made under the alternative hypotheses that Article 13 TRIPS is applicable to Articles 11*bis* and 11 Berne Convention.

Q.11 What is the legal basis for the EC view that the "minor reservations" doctrine under the Berne Convention justifies only pre-existing exceptions? Does this "grandfathering" of exceptions relate to exceptions existing prior to the conclusion of the Berne Convention, prior to the revision or amendment of certain articles (e.g., Article 9(2) in 1967 or Article 11*bis* in 1928/1948), prior the date of entry into force of the Berne Convention for a particular country entering the Union, or prior to the entry into force of the TRIPS Agreement?

Discussions in the Berne Union on the issue of "minor reservations" were never conclusive. However, one can conclude from several sources that it was intended to preserve or as the Panel puts it to "grandfather" pre-existing "minor reservations". The WIPO Guide to the Berne Convention under point 11.6 states that:

> *"It is in relation to this Article that the question of the "minor reservations" arises… At Stockholm (1967), it was agreed that the Convention did not stop member countries from preserving (emphasis added) their law on exceptions which come under this heading of "minor reservations."*

Furthermore, the Report of the Stockholm Conference (1967) (as cited in Ricketson, The Berne Convention at p. 535 - attached as Exhibit EC-11) states:

> *"210. It seems that it was not the intention of the Committee to prevent States from maintaining (emphasis added) in their national legislation provisions based on the declaration contained in the General Report of the Brussels Conference."*

The intent not to admit new "minor reservations" is confirmed by the fact that the Brussels Conference decided against the adoption of a general provision because this could "positively incite

those nations which had not, to this time, recognised such exceptions to incorporate them in their laws" (Ricketson, The Berne Convention: 1886-1986, at pp. 533 and 536).

As to the timing aspect, the benefits of the "minor reservations" doctrine should only accrue to those national legislations which have been on the statute books on or before 1967. The EC/MS would argue that countries acceding to the Berne Convention after 1967 are either completely prevented from "grandfathering" under the "minor reservations" doctrine or can only "grandfather" their pre-1967 exceptions (of course if all the other conditions are also met). To argue otherwise would give "newcomers" more rights than to established Members.

This logic has also been followed in a TRIPS grandfather provision Article 24(4) where the relevant timeframe is identical for establishment Members and newcomers. The entry into force of TRIPS would appear to be an irrelevant point in time for the "minor reservations" doctrine.

Q.12 Since under Article 11*bis*(2) equitable remuneration has to be paid, are there ways to provide such equitable remuneration other than through compulsory licensing ?

It would appear that a country could set minimum or precise levels of royalties to be paid for the different uses protected under Article 11*bis* Berne Convention. Another way to provide for equitable remuneration could be the introduction of a levy system for the audio/TV equipment purchased by the establishment being allowed to play copyrighted works without authorisations, whereby the proceeds from such a levy system are distributed to the right holders.

II. REPLIES OF THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES TO QUESTIONS FROM THE PANEL ADDRESSED TO BOTH PARTIES

Q.1 Please explain the extent to which the case law concerning Section 110(5) cited in your respective submissions is relevant for the purposes of interpreting the present subsection (A) of that paragraph.

The caselaw is first of all relevant to appreciate the development of the exceptions contained

Q.3 What is the definition of the term "nondramatic musical work" in the context of Section 110(5)? What types of musical works are either included in or excluded from the application of the provisions of that Section, and which types of copyright holders are affected by the provisions of Subsections (A) and (B)? Does it also cover communication to the public of live music performances? For example, would the performance of, e.g., one song from a musical, constitute a performance of a "dramatic" or of a "nondramatic" musical work? Is it still a "dramatic" work if a song from a musical is performed separately and by another artist? To what extent the notion of "nondramatic musical work" corresponds or is intended to correspond with the notion of "small musical rights" applied in the practice of CMOs ?

Given that neither the Berne Convention nor TRIPS provide for such a distinction, we would expect that the US points out this distinction existing in its statute, while we reserve our right to comment on such explanations.

A further possibility, which may be easier to reconcile with the text of the Berne Convention, is to consider that the "agreement" between the parties in 1967 was to *modify* the Berne Convention so as to allow what has been referred to in the diplomatic conferences as "minor reservations". This option however encounters difficulties because the Berne Convention contains specific provisions and procedures for amendment in its Article 27. This makes it difficult to argue that an amendment was effected in a General Report of the diplomatic conference.

Another possibility, which the EC would mention is that the statements about minor reservations in the General Reports could constitute genuine "reservations" to the treaty, expressed by certain parties and accepted by the other parties through their approval of the General Reports. This approach suffers from a similar difficulty to the "amending agreement" theory since the Berne Convention provides for reservations in its Article 28 and requires them to be expressed in the instrument of ratification (see also Articles 19-21 VCLT) .

The question of whether they constitute customary international law is discussed under reply to question 8 below. However, the EC/MS consider that for the present case it is not necessary to resolve the issue of the legal nature of the "minor reservations" doctrine. The content of the "minor reservations" is such that they cannot excuse the US measures subject of this dispute, whatever their legal nature.

The origin of the "minor reservations" is considered to be the General Report of the Brussels Conference (1948) in which it is stated that:

> *"Your Rapporteur-General has been entrusted with making an express mention of the possibility available to national legislation to make what are commonly called minor reservations. The Delegates of Norway, Sweden, Denmark, and Finland, the Delegate of Switzerland and the Delegate of Hungary, have all mentioned these limited exceptions allowed for religious ceremonies, military bands and the needs of the child and adult education. These exceptional measures apply to Articles 11bis, 11ter, 13 and 14. You will understand that these references are just lightly pencilled in here, in order to avoid damaging the principles of the right."*[2]

Its existence is considered to be confirmed by General Report of the Stockholm Conference (1967):

> *"In the General Report of the Brussels Conference, the Rapporteur was instructed to refer explicitly, in connection with Article 11, to the possibility of what it had been agreed to call 'the minor reservations' of national legislation. Some delegates had referred to the exceptions permitted in respect of religious ceremonies, performances by military bands, and the requirements of education and popularisation. The exceptions also apply to articles 11bis, 11ter, 13 and 14. The Rapporteur ended by saying that these allusions were given lightly without invalidating the principle in the right.*
>
> *It seems that it was not the intention of the Committee to prevent States from maintaining in their national legislation provisions*

[2] The Berne Convention for the Protection of Literary and Artistic Works from 1886 to 1986,WIPO, Geneva, 1986, page 181.

inferred that a treaty provision has become customary international law.[5] The Berne Convention is

"Special" means "out of the ordinary". Therefore this notion has a qualitative element. Special cases have to be distinguished from the non-special, i.e. normal cases. In other words, a rule-exception distinction has to be drawn.

There is also a quantitative element involved, whereby the ratio between "certain special cases" and the normal cases can under no circumstances exceed a *de minimis* threshold.

Q.11 Under the second condition of Article 13, in which respect, if at all, is a normal exploitation of the "work" the same as a normal exploitation of "exclusive rights" relating to that work?

In the view of the EC/MS, the analysis has to be done in relation to a specific exclusive right. Thus the normal exploitation of the work under Article 13 TRIPS is the normal exploitation of this very exclusive right in relation to a given work.

By arguing otherwise, entire exclusive rights could be done away with under Article 13 TRIPS if only the "core" rights would be maintained.

This latter approach would be clearly at variance with the very foundation of the Berne Convention, which establishes a sophisticated system of different exclusive rights with different fine tuning mechanisms.

Q.12 To what extent is it appropriate in evaluating the compliance of a law with the conditions of Article 13 of the TRIPS Agreement based on looking at the current market situation in a given country?

The EC/MS do not fully understand what is meant by "current market situation in a given country".

It would appear clear to us that the three conditions contained in Article 13 TRIPS have to be analysed for the territory of a given country, here the US, given that the protection of intellectual property rights is based on the principle of territoriality.

Q.13 To what extent subsequent technological and market developments (e.g., new means of transmission of or increased use of background music or television) are relevant for the interpretation of the conditions under Article 13 of the TRIPS Agreement?

It would also appear that this analysis has to be based on the socio-economic environment existing in the country concerned. We have however repeatedly pointed out that in our view, the economic effects of an exception have to be assessed as to its potential effect. See also our reply to question 9 to the EC/MS above.

Q.14 Is it justified to define the three conditions exclusively by reference to a particular market, or is a comparative analysis of licensing practices in other Members with similar

holders? In the latter case, what could be the normative concern at issue? In addition to an empirical analysis of prejudice to legitimate interests, how could such a normative element be taken into account in defining the threshold of the third condition of Article 13?

It is not quite clear to the EC/MS what is meant by "normative concern". As also pointed out in the reply to question 18 below, the EC/MS consider that both normative and empirical elements have to be taken into consideration under Article 13 TRIPS and that empirical elements can have an impact on normative questions. We would also refer to the example given in the reply to question 18 below.

Q.16 What is the extent of "reasonable" prejudice to the legitimate interests of rights holders that is permissible under the third condition of Article 13?

All three conditions referred to in Article 13 TRIPS are intended to make sure that the exception-rule situation not be reversed. The reasonable prejudice has to be compared within the unreasonable prejudice. While, as we have pointed out earlier (see points 73 et seq. of our oral statement), it may be difficult to draw an exact line between reasonable / unreasonable prejudice, there can be no doubt in view of the EC/MS that the prejudice caused by an exception which covers 45 to more than 70 % of establishments can under no circumstance be considered reasonable because it reverses the rule-exception situation.

Q.17 With a view to giving distinct meaning to the second and the third condition of Article 13, in which respect does an extent, degree or form of interference with exclusive rights below the threshold of "conflict with normal exploitation" differ from an extent, degree or form of interference with exclusive rights that exceeds the threshold of a reasonable prejudice to the interests of the right holder ? In other words, how does a permissible degree of prejudice under the third condition relate to "normal exploitation" under the second condition of Article 13?

The EC/MS agree that the second and third conditions of Article 13 TRIPS are distinct conditions, which must be applied cumulatively.

First, the requirement that an exception or limitation does not conflict with normal exploitation of the work would appear to call for a more normative or qualitative approach than the third requirement. This appears from the comparison of the word "conflict" (in the sense of "interfere with" or "not be consistent with") with the term "unreasonably prejudice".

Second, "normal exploitation of the work" requirement differs from the "legitimate interests of the right holder" in a number of ways. Exploitation, which is not "normal", may still be a "legitimate interest" of the right holder. Also, "exploitation" refers to the ways in which an author may obtain a *reward* from an exclusive right in his work, whereas his "interests" may cover other matters than financial interests in the exploitation of the particular right in question, such as his interest in an acknowledgement of his work or information about its use.

As a result of the excessive coverage of situations by Section 110(5) (see also the results of the Dun & Bradstreet analysis to which we have referred repeatedly), there can be no doubt in view of the EC/MS that neither of the latter two conditions of Article 13 TRIPS are met.

Q.18 Should quantitative empirical or normative approaches be used in defining the three conditions of Article 13?

In view of the EC/MS, both quantitative and normative elements have to be used for the interpretation. There are also instances in which quantitative data can influence a normative assessment like in the situation where it is established from quantitative data that the exception

covers more than one half of all situations, thus reversing the rule-exception principle which underlies Article 13 TRIPS.

ATTACHMENT 1.4

RESPONSES OF THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES TO WRITTEN QUESTIONS FROM THE UNITED STATES – FIRST MEETING

(19 November 1999)

Q.1 Does the EC have any factual support for its assertion that European music represents 25 % of all music played in the US?

Please see reply to question 5 asked by the Panel to the EC/MS.

Q.2 On what facts does the EC base its assertion that establishments in the US have "adapted their music installation" or have cancelled contracts for commercial music services in the wake of the Claire's Boutiques and Edison Bros. decisions?

It clearly appears from the complaint for Declaratory Judgement and the Motion of Plaintiff for summary judgement in the case Edison Brothers Stores Inc. v. Broadcast Music Inc. (Edison case) (see Exhibits EC-19 and EC-20) that Edison adapted the music equipment in its stores in order to benefit from the homestyle exemption. This is referred to as the "Edison radio policy" which was initially agreed with BMI until it revoked its agreement (which gave rise to the Edison proceedings).

In its *amicus curiae* brief submitted to the Court of Appeals in the Claire's Boutiques proceedings (see Exhibit EC-21), ASCAP declared that it believed that *"this decision* (i.e. the District Court's decision), *if not reversed, will result in a very substantial reduction in license fees from owners of establishments who use music by means of radios and loudspeaker systems and from background music licensees, many of whose subscribers will cancel their subscriptions and substitute radio music"*.

Q.3 Does the EC contend that no exceptions to the public performance are permissible to Berne Article 11 rights?

As pointed out in the reply to question 11 by the Panel to the EC/MS, the discussions in WIPO on the "minor reservations" doctrine have concentrated on Article 11 Berne Convention. In view of the EC/MS, Section 110(5) under no circumstances would qualify as a "minor reservation" as addressed in WIPO even if the "doctrine" were applicable to Article 11 Berne Convention.

Q.4 Does the EC contend that the "minor reservations" doctrine does not permit any

Q.6 Out of the 70% of all eating and drinking establishments and 45% of all retail establishments that the EC alleges are impacted by the 1998 Amendment, does the EC have any factual data regarding:

- **how many of these establishments play music at all ?**

- **how many of these establishments play radio music as opposed to recorded music?**

All percentage figures given in the Dun & Bradstreet analyses, including of course the basis of 100%, are potential users. The exempted potential users are free to benefit from the possibility offered by Section 110(5) at will at any point in time and without any notification to the right holders or their collecting societies. Therefore, the EC/MS would consider that the question of *"how many establishments actually play music from the radio or recorded at a given point in time?"* is of secondary importance and factually difficult to establish.

Q.7 On what facts does the EC base its assertion that EC right holders have lost or will lose revenue as a result of Section 110(5)(B). What is the estimated amount of the losses or projected losses?

As appears from the joint press release by BMI and ASCAP on the day after the adoption by

If an exception from copyright liability is provided for in a national law of a WTO Member, which concerns several exclusive rights for which different conditions apply, these different conditions have to be met cumulatively.

Q.10 Does the EC contend that under no circumstances may an exemption for any commercial purpose be permissible to the Berne Article 11 and 11*bis* rights?

The EC/MS are of the view that the "minor reservations" doctrine does not allow exceptions for a commercial use of the right. See also reply to question 9 from the Panel to both Parties. We would, however, not exclude that an exception for commercial purposes could, if properly formulated, meet the requirements set out in Article 11*bis*(2) Berne Convention.

ATTACHMENT 1.5

SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

(24 November 1999)

Table of Contents

I. INTRODUCTION

1.

copyright protection for situations comparable to Section 110(5) Copyright Act. It is also noteworthy that a certain number of countries (Brazil, India, the Philippines and South Africa) do not yet have to comply with the copyright section of Part II of TRIPS because they benefit from additional transitional periods under Article 65(2) TRIPS and their domestic legislation has not yet been subject to TRIPS review.

5. US practices

14. It is worth noting that examples of exceptions, which are similar to the third country practices indicated by the US, do exist also in the US copyright law outside Section 110(5) Copyright

(b) Scope and timing

21. Eventually, the EC/MS consider that these difficult legal questions can remain unresolved in the case before us, because the exceptions provided for in Section 110(5) Copyright Act go, in many aspects, significantly beyond what the "minor reservations" doctrine would have allowed.

22. As far as the scope of "minor reservations" is concerned, only three instances for exceptions have been mentioned in the General Reports, which were religious ceremonies, playing of military bands, child and adult education. There can be no doubt and, as it appears, nobody has argued so far that the exceptions created by Section 110(5) Copyright Act fit under any of the three headings or are comparable with any one of them.

23. Furthermore, there exists clear textual evidence that the "minor reservations" doctrine was intended to "grandfather" the practices referred to in the preceding paragraph, existing on or prior to the Diplomatic Conference in 1967. At that time the US did not have any such exception clause, and the US only became a Berne Union Member in 1989.

24. To recapitulate, whatever the legal status of the "minor reservations" doctrine, Section 110(5) Copyright Act would clearly not be covered by its scope nor by its "grandfathering" aspect. In other words, no exception under the Berne Convention excuses Section 110(5) Copyright Act.

3. Article 13 TRIPS

25. While both Parties agree apparently to the principle, which is clearly set out in Article 2(2) TRIPS and Article 20 Berne Convention, that the TRIPS Agreement was intended to increase the level of protection of intellectual property rights, the US argue that Section 110(5) Copyright Act could be justified under Article 13 TRIPS.

26. The application of Article 13 TRIPS to the rights contained in Article 11*bis*(1) Berne Convention, has also to be seen in relation to Article 11*bis*(2) Berne Convention, which stipulates a specific exception clause for the rights contained in Article 11*bis*(1) Berne Convention. This means that any exception would, as a minimum, have to provide for the equitable remuneration to be granted to the right holder. This is not the case under Section 110(5) Copyright Act. The EC/MS are of the view that Article 11*bis*(2) Berne Convention applies to all exceptions and limitations to Article 11*bis*(1) Berne Convention. There is no language whatsoever to support the US' view that Article 11*bis*(2) Berne Convention only applies to compulsory licences. The language in the title of Article 11*bis* Berne Convention is irrelevant given that it is not based on a negotiated text but on a draft done by the International Bureau of WIPO.[8]

27. The EC/MS have consistently argued that Article 13 TRIPS, for a multitude of reasons, does not apply to Articles 11*bis*(1) and 11(1) Berne Convention. Even if one were to give to Article 13 TRIPS a role in the context of exceptions to exclusive rights under Berne Convention, one would have to respect the principle that TRIPS rather than to grant new or extend existing exceptions, has as objective to reduce or eliminate existing exceptions. Also the language of Article 13 TRIPS itself says that:

> "Members shall confine (emphasis added) their limitations or exceptions… "

[8] See footnote 1 to Article 1 Berne Convention.

failed if only one of its constituent element fails. In other words, if the test is not met on the basis of the individual exclusive right, the entire test is not met and it is irrelevant of how the analysis for the entire work turns out.

34. Finally, the EC/MS would like to reiterate that according to well-established WTO jurisprudence[12], it is the task of the US to prove that the exceptions invoked are applicable and their conditions fully met.

IV. CONCLUSION

35. Under Article 64(1) TRIPS, Article XXIII GATT and Article 3(8) DSU, the violation to the US' obligations under the TRIPS Agreement are considered prima facie to constitute a case of nullification or impairment.

36. The EC/MS therefore respectfully request the Panel to find that the US have violated their obligations under Article 9(1) TRIPS together with Articles 11*bis*(1)(ii) and 11(1)(ii) Berne Convention and should bring their domestic legislation into conformity with their obligations under the TRIPS Agreement.

[12] See reference under point 47 of our oral presentation at the first meeting with the Panel.

ATTACHMENT 1.6

ORAL STATEMENT OF THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES AT THE SECOND MEETING WITH THE PANEL

(7 & 8 December 1999)

Table of Contents

I. INTRODUCTION

This is the second hearing in this case and thus the last opportunity for the Parties to present their facts and arguments as a whole to you.

The EC/MS will present its case in the light of the facts and arguments made available by the Parties and third Parties. Wherever necessary, we will also comment on the US' replies to questions from the Panel and the EC/MS and on the US' rebuttal statement dated 24 November 1999.

II. FACTUAL ELEMENTS

1. It would appear to the EC/MS that the coverage of Section 110(5) Copyright Act has by now been largely clarified by the Parties with the exception of the question of the interplay and separation between Subsections A and B and the applicability to the IT world and Internet.

2. As to the first issue, the plain text of Subsection A would suggest that all copyright works, which are susceptible to be communicated to the public by loudspeaker, are covered. Subsection B defines its coverage as nondramatic musical works. While it appears possible to draw an *a contrario* argument from Subsection B with the result that Subsection A does not apply to nondramatic musical works, it is far from certain that US Courts would consistently follow this *a contrario* argument.

When the US mention (point 4 of their rebuttal statement) that there exists *« … consistent jurisprudence of US Courts interpreting the homestyle exemption… »*, the EC/MS would like to remark that there exists not a single US Court decision to date, which interprets the scope of Section 110(5)(A) Copyright Act.

3. Also, the distinction between dramatic and nondramatic musical works remains unresolved. While the US have pointed out at the first meeting upon a question from the Panel that the distinction is made definitively when the work is created, the EC/MS have put forward in their rebuttal statement that, according to US literature, the dividing line is not a permanent one, but depends on the circumstances of the performance. In other words, this would suggest that an individual aria from an opera or a song from a musical played on the radio or TV are to be considered as nondramatic, which in turn has important repercussions for the licensing practice.

4. While the EC/MS appreciate that in the IT world other exclusive rights than the ones covered by Section 110(5) Copyright Act are relevant for communications to the public, no argument has been put forward by the US, that the exemptions contained in Section 110(5) Copyright Act do not apply in the digital context.

III. LEGAL ELEMENTS

5. While the language used by the US differs, it would appear that the US agree in essence with the EC/MS.

Section 110(5) Copyright Act is inconsistent with Article 9(1) TRIPS together with Articles 11*bis*(1)(iii) and 11(1)(ii) Berne Convention unless the US can demonstrate that their measure is covered by an exception provision.

6. The US argue that Article 13 TRIPS allows the exceptions to Articles 11*bis*(1) and 11(1) Berne Convention, which are contained in Section 110(5) Copyright Act.

In view of the EC/MS, the exemptions contained in Section 110(5) Copyright Act cannot be justified under any kind of argumentation in relation to Article 13 TRIPS.

7. The EC/MS have pointed out in detail why in their view, Article 13 TRIPS is not applicable to the Berne rights, which have been incorporated into TRIPS by reference. The plain text, the negotiating history and the object and purpose of TRIPS militate for this result.

8. However, even if one were to argue that Article 13 TRIPS may play a role in the context of exceptions to Berne rights, the exceptions contained in Section 110(5) Copyright Act cannot be justified.

9. It would appear that the US agree that one of the major objectives of the TRIPS Agreement consists in increasing the level of IPR protection as compared to the level of protection prevailing under the pre-existing WIPO Conventions. This in turn means for Article 13 TRIPS that – if it were applicable to Articles 11*bis*(1) and 11(1) Berne Convention – its objective would have to consist in

thorny issue in the case before the Panel, because the exceptions contained in Section 110(5) Copyright Act do under no circumstance meet the requirements on scope and timing as referred to in the General Reports.

16. The only instances, which were mentioned in the discussions on "minor reservations" at the two diplomatic conferences were military bands, religious services and child and adult education. Obviously, Section 110(5) Copyright Act is not limited to any of these categories. But even if one were to argue that these three instances were only illustrative, their common features consist in being for non-commercial activities and for a well-defined social purpose. Given that Section 110(5) Copyright Act is directly intended to serve commercial interests by the use of the copyright works in commercial establishments for the enjoyment of customers with the objective to enhance turnover and profit neither of these common characteristics can be found in Section 110(5) Copyright Act.

17. The US argument that the underlying policy consideration for Section 110(5) Copyright Act consists in fostering small businesses is spurious at best. First of all, it has to be remembered that copyright owners themselves are in their vast majority "small businesses" and second as is well evidenced in the Claire's Boutique case (see Exhibit EC-6) the homestyle exemption applies to big corporations. Claire's Boutique Inc. had a yearly turnover in the vicinity of 200 million dollars and net earnings in excess of 13 million dollars.

(b) The "minor reservations" doctrine as a grandfathering device

18. As to the aspect of timing for the adoption of minor exceptions, we maintain our view that the citations from the General Reports make it utterly clear that the "minor reservations" doctrine was intended to "grandfather" existing practices and not as an invitation to Berne Union Members to subsequently adopt such "minor reservations".

19. Also as to the application of grandfather provisions to newcomers to a convention, our arguments remain. There is no reason to treat newcomers any better than established Members, by allowing them to reduce the level of obligations at a time when an established Member would no more be allowed to do so. This approach is perfectly neutral as to the level of development of a country Member or candidate to an international convention.

20. The case of the Berne Convention represents indeed a good illustration of the non-discriminatory effects of this approach in a situation in which the vast majority of developing countries were already a Member of the Berne Union at the moment the US joined. Furthermore, TRII 0dre al8.40tf tntry Memic.7 ofh20l52 -0.a1rbr"grl1434(dquefath24(4 Given th0to 39tion.
(b) TRModectLaw thration for as a grandfathering device

Free uses according to the Model Law include:

(a) use of a work for one's own personal and private requirement;

(b) quotations compatible with fair practice and to the extent not exceeding that justified by the purpose;

(c) the use of a work for illustration in publications, broadcast or sound or visual recordings for teaching, provided that such use is again compatible with fair practice and that the source and the name of the author are mentioned by the user;

(d) the reproduction in the press or communication to the public of articles on current economic, political or religious topics published in newspapers or periodicals and broadcast works of the same character, provided that the source is indicated by the user and such uses were not expressly prohibited when the work was originally made accessible;

(e) the use of a work that can be seen or heard in the course of a current event for reporting on that event;

(f) the reproduction of works of art and architecture in a film or television broadcast, if their use is incidental or if the said work is located in a public place;

(g) the reprographic reproduction of protected work, when it is made by public libraries, non-commercial documentation centres, scientific institutions and educational establishments, provided that the number of copies made is limited to the needs of their activities and the reproduction does not unreasonably prejudice the legitimate interest of the author;

(h) the reproduction in the press or communication to the public of political speeches, speeches delivered during legal proceedings, or any lecture or sermon delivered in public, etc, provided that the use is exclusively for the purpose of current information and does not mean publishing a collection of such works.

(d) WCT and WPPT

22. Finally, the US rely on the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) in order to suggest that some wide undefined exceptions must exist under the Berne Convention.

23. We have already pointed out in the rebuttal statement that given the

23.

23. under

25. The arguments put forward in relation to Article 10 WCT apply *mutatis mutandis* to Article 16 WPPT.

26. All in all, it can be said that there exists no exception or limitation provision – express or implied – under the Berne Convention which could justify the exemptions contained in Section 110(5) Copyright Act, leave alone an exception or limitation provision which when "narrowed down" by Article 13 TRIPS could justify Section 110(5) Copyright Act.

2. Article 13 TRIPS

27. In the hypothesis that the Panel should consider that Article 13 TRIPS is of relevance for the assessment of Section 110(5) Copyright Act, we now apply the three steps test provided for in Article 13 TRIPS to Section 110(5) Copyright Act.

(a) Certain special cases

28. We have pointed out repeatedly why we consider that the exemptions contained in Section 110(5) Copyright Act do not constitute "certain special cases". We do not intend to repeat the reasons here, but think it is sufficient to say that exceptions which unconditionally exempt 45 to more than 70% of all retail, drinking and eating establishments from copyright liability for playing of copyright works from the radio or TV and exempting the remainder of such establishment under generous conditions cannot be considered as certain special cases, such exemptions are rather a reversal of the rule-exception principle.

(b) Conflict with the normal exploitation

29. Here again we have pointed out in detail the reasons why we consider that the exemptions created by Section 110(5) Copyright Act (see for example our replies to questions 11 and 12 from the Panel to both Parties) do conflict with the normal exploitation. We would limit ourselves to mention here again the sheer size of the exception, which covers huge proportions of entire business sectors unconditionally and thus, conflict with the normal exploitations of the public performance rights.

(c) Unreasonable prejudice to the legitimate interests of the right holders

30. We do not intend to repeat all the arguments we have made in support of our view that the exemptions contained in Section 110(5) Copyright Act do indeed unreasonably prejudice the legitimate interests of the right holders, but we would like to concentrate on the new quantitative guestimates made in this context by the US in its rebuttal statement (points 33 et seq.).

31.

Section 110(5) Copyright Act do constitute an unreasonable prejudice to the legitimate interest of the right holder.

(i) US guestimate of losses

33. In its rebuttal submission, the US have made an attempt to minimize the prejudice on the basis of guestimated actual losses based on historic distributions by one single collecting society (ASCAP).

In view of the EC/MS, this approach is fundamentally flawed for a number of reasons:

34. The distributions from collecting societies to right holders are a function of their collections on the market and the collections on the market in turn are a function of the legal protection of the relevant exclusive rights.

In the US, the rights referred to in Articles 11*bis*(1)(iii) and 11(1)(ii) Berne Convention were not at all protected until 1976 (see the US Supreme Court Decision in Aiken, Exhibit EC-1). While these exclusive rights were protected in general from 1976, the "homestyle" exemption was introduced at the same time by the previous version of Section 110(5) Copyright Act.

This exemption already excluded a wide range of commercial uses (see for example the situations in the Claire's Boutique and Edison cases, Exhibits EC-6 and EC-5 respectively), thus seriously reducing the number of businesses subject to a need to obtain a license.

35. Furthermore, the fact that the National Licensed Beverage Association (NLBA) has, according to the US, concluded in 1995 an agreement with the US collecting societies, which excludes all establishments below 3,500 square feet from copyright liability and under certain conditions excludes larger establishments from such liability (see first written909 Tc ((1)() aeaso9(det lind Desnght,

40. In the database run by Dun & Bradstreet (see Exhibit EC-16), the figures for 1998 show for the entire US:

- 49,061 drinking establishments, and

- 192,692 eating establishments,

with a square footage of below 3,750 square feet and

- 281,406 retail establishments with a square footage of below 2,000 square feet.

These figures are likely to be lower that the actual number of establishments when compared to the figures for eating establishments on the basis of the US Census Bureau data for 1996 (see Exhibit US-18) from which a figure of 240,000 eating establishments below 3,750 square feet resorts.

41. As a second step, we would agree with the US that not all these establishments would actually play music from the radio or TV on their premises for the enjoyment of their customers.

The US offer in their rebuttal submission (see point 39) the hypotheses that 30.5% of all eating and drinking establishments with a surface below 3,750 square feet, actually play music from the radio in their establishments.

While this assumption has not been motivated by the US, we will use this hypothesis for this analysis and apply it equally to retail establishments.

This process demonstrates that:

- 14,700 drinking establishments,

- 57,800 eating establishments, and

- 84,400 retail establishments,

which all fall below the 3,750/2,000 square feet threshold actually play music from the radio on their premises without having to pay for a license. This analysis disregards the playing of music from TV.

42. As a subsequent step, the appropriate licensing fee for playing music from the radio in the relevant establishments, has to be selected from the licensing schedules of ASCAP (an excerpt is provided as Exhibit EC-26) and BMI (an excerpt is provided as Exhibit EC-27).

Given that ASCAP and BMI represent different repertories, licenses have to be sought from

43. When applying the respective rate to the number of establishments playing music from the radio in their establishments, one arrives at the amount of lost revenue by BMI and ASCAP as a consequence of the operation of Section 110(5) Copyright Act.

For eating and drinking establishments, the lost revenues amount to 29.725 mio US$ and for retail establishments, lost revenues amount to 23.93 mio US$ which adds up to a total of 53.65 mio US$.

44. These are the losses in relation to all right holders, US right holders, EC right holders and right holders from third countries. This analysis also confirms the claim made by BMI and ASCAP in their press release on the day following passage of the Fairness in Music Licensing Act (see Exhibit EC-14) when they state that:

> *"The earnings of song writers, composers and publishers have been reduced by tens of millions of dollars annually"*

45. This excursion into the sphere of estimated actual losses suffered by copyright owners from the operation of Section 110(5) Copyright Act confirms the analysis based on potential losses presented earlier and does in the view of the EC/MS clearly indicate that the exceptions provided for in Section 110(5) Copyright Act do unreasonably prejudice the legitimate interests of the copyright owner and thus also the third condition contained in Article 13 TRIPS cannot be met.

IV. CONCLUSION

46. The EC/MS therefore respectfully request the Panel to find that the US have violated their obligations under Article 9(1) TRIPS together with Articles 11*bis*(1)(iii) and 11(1)(ii) Berne Convention and should bring their domestic legislation into conformity with their obligations under the TRIPS Agreement.

Of course, the EC/MS would be pleased to reply to any further question the Panel might have. As to the replies provided by WIPO, the EC/MS reserve their right to comment after having had the possibility to carefully look at them.

ATTACHMENT 1.7

COMMENTS FROM THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES ON THE LETTER FROM THE DIRECTOR GENERAL OF WIPO TO THE CHAIR OF THE PANEL[1]

(12 January 2000)

1. The European Communities and their Member States (EC/MS) would like to express through you their appreciation to the International Bureau of WIPO for its work done to reply to the Panel's three questions.

2. As to the substance of the replies given, we note that no evidence in relation to the existence and scope under the Berne Convention of any exception or limitation including the so-called "minor reservations" doctrine, which would be susceptihs02 Commuons.

ATTACHMENT 2.1

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

(26 October 1999)

Table of Contents

I. INTRODUCTION

1. Section 110(5) of the United States Copyright Act of 1976[1] is fully consistent with the United States' obligations under the Agreement on Trade-Related Aspects of Intellectual Property

6. By its nature, the licensing of thousands of individual restaurants and retail establishments is a difficult and resource-intensive process.[7] Naturally, there is a point at which the potential licensing revenue does not justify the administrative burden of the licensing process. The licensing process is especially difficult with respect to smaller establishments that might benefit from the homestyle exception. Congress expected the homestyle exemption to have a limited economic effect because it essentially codified the licensing practices of the performing rights organizations ("PROs") with respect to such establishments. As observed in the House Report on the homestyle exception, "in the vast majority of cases no royalties are collected today, and the exemption should be made explicit in the statute".[8]

7. In the almost two and one-half decades since the homestyle exemption was enacted, U.S. courts have applied the exception narrowly and in a manner consistent with Congress's intent. Of the forty decisions reported under Section 110(5) (now Section 110(5)(A)), only three courts have found that the defendant was entitled to take advantage of the exception. In reaching their conclusions, courts have generally engaged in a highly fact-specific analysis, taking into account the factors cited in the text and legislative history of Section 110(5)(A). For example, in *Sailor Music v. Gap Stores, Inc.*, the Court of Appeals for the Second Circuit found that a chain store was not entitled to the homestyle exception because it used four to seven speakers recessed in the ceilings of its stores, and in the court's words, "was of sufficient size to justify, as a practical matter, a subscription to a commercial background music service".[9] Similarly, in *Broadcast Music, Inc. v. United States Shoe Corp.*, the Court of Appeals for the Ninth Circuit followed *u0.1ih11.25 n t.25 0.0057 Tc 0.od 3d4a Tj 64.5 0 9-325*

were configured in a manner commonly found in a home.[11] Similarly, in *Broadcast Music, Inc. v. Edison Brothers* , the court was persuaded that the exemption applied where it found that the company used only "low grade radio-only" receivers, with no more than two portable speakers placed within 15 feet (4.6m) of the receiver.[12]

9. Taken as a whole, the substantial body of case law under Section 110(5)(A) demonstrates its limited nature and careful application by the courts. In addition, however, it is important to recognize that the 1998 Amendment dramatically limited the homestyle exception even further. As the EC acknowledges, Section 110(5)(A) no longer covers nondramatic musical works at all. Rather, it covers only other types of works, such as plays and operas. No licensing mechanism currently exists for right holders to collect royalties on a collective basis for secondary performances of these

11. At that time, the PROs also proposed amendments to Section 110(5) that they believed

14. In October 1998, after extended negotiations between the PROs and the coalition, Congress passed legislation amending Section 110(5), with terms very similar to the NLBA agreement. The 1998 amendment revised Section 110(5) to add subsection (B), which applies exclusively to nondramatic musical works. The new subsection (B) exempts secondary performances of nondramatic musical works based on defined criteria of square footage and/or equipment, subject to three additional limitations. It provides in full as follows:

> (5)(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public originated by radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if:
>
> (i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (185.9 m. sq.) (excluding space used for customer parking and for no other purpose) and:
>
> (I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or
>
> (II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;
>
> (ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (348.5 m. sq.) (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and:
>
> (I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or
>
> (II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than one audiovisual

> device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;
>
> (iii) no direct charge is made to see or hear the transmission or retransmission;
>
> (iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and
>
> (v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed.[23]

15. This legislation was part of a larger bill in which the term of protection for copyright was extended by twenty years, giving copyright owners substantially more protection than that required by international agreements.

16. Contrary to the assertions of the EC, Section 110(5)(B) does not apply to the communication of works over the Internet.[24] In fact, neither Section 110(5)(A) or Section 110(5)(B) exempts communications over a digital network. Such communications, by the very nature of the technological process of transmission, involve numerous incidences of reproduction, and could implicate the distribution right as well. When a work is transmitted to a distant location over a computer network, temporary RAM copies are made in the computers through which it passes, by virtue of the technological process of transmission.[25] This is an essential function of the way that digital information is transported over a digital network. The Section 110(5) exemptions, both (A) and (B), only apply to the performance right, and do not affect copyright holders' exclusive reproduction and distribution rights. Therefore, even under Section 110(5) as amended, establishment owners generally must still seek a license for the reproduction and possibly distribution rights implicated by Internet transmissions.

III. LEGAL ANALYSIS

17. The EC devotes almost its entire legal argument to arguing that Articles 11 and 11*bis* of the Berne Convention are implicated by the Section 110(5) exemptions. This issue is not in dispute. The relevant issue in this case is not whether Berne rights are implicated, but whether the provisions at issue are permissible exceptions under the standard of TRIPS Article 13. In its submission, the EC does not substantively address this central issue at all.

18. TRIPS Article 9(1) incorporates Articles 1 through 21 of the Berne Convention. The Berne Convention permits members to make "minor reservations" to the exclusive rights guaranteed by Berne, including limitations to the public performance right in Article 11 and 11*bis*.[26] TRIPS

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[23] P.L. 105-298, Section 202 (annexed as exhibit US-10).

[24] EC first submission, para. 39.

[25] The US courts have consistently held that RAM copies implicate the copyright holder's reproduction right. *See, e.g., MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th

Article 13 articulates the standard by which the permissibility of these limitations to exclusive rights must be judged. This standard is based on the language in Berne Article 9(2),[27] which pertains to exceptions to the reproduction right, and provides: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

19. Article 13 of the TRIPS Agreement provides that "Members shall confine limitations and

25. Section 110(5)(A) is confined to certain special cases – *i.e.*, those involving use of a "homestyle" receiving apparatus. This is a fact-specific standard, but nonetheless one that is well-defined. Courts have considered the various factors articulated in the text and legislative history of the provision in determining whether a given establishment meets the Section 110(5)(A) standard. Although judges may have weighed the various factors differently in making their individual decisions, these cases reflect the reasonable and consistent application of a fact-specific standard in a common-law system.

26. Section 110(5)(B) is also confined to certain special cases, and defines with great precision the establishments that are entitled to benefit from the exception. The size and equipment limitations in the law are unambiguous, and can be applied with ease.

B. SECTION 110(5) DOES NOT CONFLICT WITH NORMAL EXPLOITATION

27. There is no normative definition in TRIPS as to what constitutes the "normal exploitation" of a copyrighted work. The normal exploitation of a work, however, can and must necessarily include permissible exceptions to an author's exclusive rights – it is for the purpose of allowing those exceptions that Article 13 was included in the TRIPS Agreement. Limitations and exceptions to exclusive rights by definition deprive a copyright owner of potential compensation for certain uses of his or her work. If every time a copyright owner was deprived of any potential compensation, such deprivation constituted a conflict with normal exploitation, then Article 13 would have no meaning.

28. To determine what constitutes normal exploitation, the Panel must look at all "the ways in which an author might reasonably be expected to exploit his work in the normal course of events".[30] Under U.S. copyright law, the copyright owner of a musical work has a broad range of exclusive rights. Those most important to such right holders include the right to reproduce their work in copies and phonorecords, the right to distribute and sell those copies and phonorecords, and the right to perform their music publicly.[31] Section 110(5) is an exception to only the public performance right.

29. With respect to the public performance right, by far the most significant area of exploitation for the copyright owner is the primary performance of the work. The compensation paid by broadcasters for the right to broadcast the musical work is particularly important. Royalties from broadcasting and live performance are the principal means by which copyright owners in nondramatic musical works receive compensation for the public performance of their works. Section 110(5) does not affect a copyright owner's right to be compensated for these types of exploitation. Rather, it affects only secondary uses of broadcasts. Moreover, it does not exempt all secondary performances, but only those in establishments that use homestyle receiving equipment, or meet the square footage and other criteria in the statute. Finally, even in those establishments exempted by Section 110(5), owners must still pay licensing fees for the use of recorded music, on CD or cassette tapes, and for live performances of music.

30. Furthermore, as noted by Professor Ricketson, a use does not conflict with normal exploitation if the copyright owner would not otherwise expect to collect a fee from that use.[32] It is important to emphasize that the issue in this dispute is the scope of normal exploitation in the United States. Thus, even though a use may technically fall within the exclusive rights of the copyright owner, it may not normally be capable of being exploited within a particular market or jurisdiction.

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[30] Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986, 483 (Kluwer 1987). This language refers to the use of the phrase "normal exploitation" in the context of Berne Art. 9(2).

[31] This includes the right to broadcast their work found in Berne Art. 11*bis*.

[32] Ricketson, at 483 (an example of uses that would not conflict with normal exploitation is "uses for which [the copyright owner] would not ordinarily expect to receive a fee - even though they fall strictly within the scope of his [exclusive] right").

With respect to the homestyle exemption in Section 110(5)(A), even before nondramatic musical works were removed from its scope by the passage of the 1998 Amendment, it was limited to establishments that were not large enough to justify a subscription to a commercial background music service.[33] As noted in the House Report, Congress intended that this exception would merely codify the licensing practices already in effect by the right holders and their licensing organizations.[34] Congress's intent and scope has been followed by the courts, as discussed above. Since 110(5)(A) only affected establishments that were not likely otherwise to enter into a license, or would not have been licensed under the practices at that time, it did not conflict with the expectations of right holders concerning the normal exploitation of their works.

31. Now that Section 110(5)(A) excludes nondramatic musical works (*e.g.*, songs commonly played on the radio rather than as part of a larger dramatic performance such as an opera) from its scope, it is even more clear that it does not conflict with the normal exploitation of copyrighted works. For nondramatic musical works, there is, at least, a collective licensing mechanism (the PROs) that generates *some* revenue from secondary performances. For the remaining works covered by the exemption, such as operas, plays, and musicals, there is no such system for the collective licensing of secondary performances, and little or no direct licensing by right holders to retail, eating or drinking establishments. Owners of copyright in these works do not and have never expected direct revenue from secondary performances in such establishments. In other words, licensing this aspect of the performance right is not a part of how an author "might reasonably [] expect[] to exploit his work in the normal course of events.[35]

32. In the case of Section 110(5)(B), a significant portion of the establishments exempted by that section had already been exempted, for almost a quarter of a century, by the homestyle exception. Owners of copyrights in nondramatic musical works had no expectation of receiving a fee from these establishments. Moreover, even if Section 110(5)(B) had not been passed, many of the establishments now eligible for that exemption would have been able to avail themselves of the nearly identical exemption under the NLBA agreement voluntarily concluded by the PROs. Thus, even prior to the passage of the 1998 Amendment, copyright owners would not normally expect a fee from these establishments either. In the final analysis, a small number of establishments may not have been entitled to take advantage of either the homestyle exemption or the NLBA agreement; and thus were newly exempted under Section 110(5)(B). However, when viewed against the panoply of exploitative uses available to a copyright owner under the U.S. Copyright Act, this minor limitation on some secondary uses on broadcasts to the public simply does not rise to the level of a conflict with normal exploitation.

C. SECTION 110(5) DOES NOT UNREASONABLY PP

1. Section 110(5)(A)

34. The economic effect of Section 110(5)(A) was minimal even before the passage of the 1998 Amendment, and thus caused no unreasonable prejudice to any legitimate interests of EC right holders. Returning again to the fundamental intent of the provision, it was to exempt from liability small shop and restaurant owners whose establishments, for a variety of reasons, would not have justified a commercial license. In general, where no such licenses would have been sought or issued in the absence of an exception, there is literally no economic detriment to the right holder from an explicit exception.[37] The establishments exempted by Section 110(5)(A), with small square footage and elementary sound equipment, are the least likely to be aggressively licensed by the PROs and licensing fees for these establishments would likely be the lowest in the range.[38] Furthermore, given

- finally, subtract again for the establishments that would [redacted] rn off the music rather than pay the fees demanded by the PROs.

While these figures are impossible to estimate wit[redacted]ample reason to believe that they represent substantial numbers [redacted]tic figure of the number of establishments from which co[redacted]ever, would not present a true figure of economic harm [redacted]Wh[redacted]ould be collected from these smaller establishments [redacted]reduced [redacted]tion due to right holders in the EC, as opposed to a[redacted]

38. The EC makes no attemp[redacted]se factors into acc[redacted]erely asserts that copyright owners have been dep[redacted]d significant source of [redacted]t providing any support for this assertion, the EC [redacted]ot presented a *prima facie* [redacted]udice suffered by EC right holders is unreasonable within the meaning of Article 13 [redacted]eement.

39. In light of the history of the 1998 Amendment, and [redacted]ty between that legislation and the voluntary agreement reached between the PRO[redacted]n 1995, the EC's claim that copyright holders are suffering unreasonable preju[redacted]e tenuous. As previously discussed, the PROs voluntarily concluded the agreen[redacted]BA that exempts almost the same establishments. Far from alleging unreasonablene[redacted]d this agreement as a "fair" deal that "protected" their members' rights. Marilyn Be[redacted]and Chairman of ASCAP, explained in ASCAP's 1996 Annual Report, "We are p[redacted]ched a resolution with the NLBA and it is a good one for both of our organizations".

40. Finally, the analysis of unreasonable prejudice must a[redacted]ount the limited resources of the PROs and the small percentage of the market actu[redacted]e PROs. In light of the certainty provided by the precise limitations of the Section 1[redacted]on, the PROs can now efficiently redirect their licensing resources toward those e[redacted] eligible for the Section 110(5)(B) exemption, and thus compensate for any min[redacted]might suffer. In fact, the largest PRO has already stated its intent to do exactly [redacted]nerate additional income by encouraging live and recorded music, for which there [redacted] Even before the 1998 Amendment went into effect, ASCAP outlined its plan[redacted] effects" of the legislation: "A critical element of our plan will be to *ag*[redacted] *those eligible establishments that have withheld royalty payment and to promot*[redacted] *and mechanical music to a large number of newly targeted establishments.*"[40]

IV. CONCLUSION

41. For all of these reasons, the Panel should find th[redacted] 110(5)(A) and Section 110(5)(B) of the U.S. Copyright Act meet the standa[redacted] of the TRIPS Agreement and the substantive obligations of the Berne Conventi[redacted]ns are limited to certain special cases, and do not conflict with a normal exp[redacted]work, nor cause unreasonable prejudice to the legitimate interests of EC right holde[redacted]his Panel should dismiss the claims of the EC in this dispute.

[redacted]

have considered the various factors articulated in the text and legislative history of the provision in determining whether a given establishment meets the homestyle exemption standard. Although judges may have weighed the various factors differently in making their individual decisions, these cases reflect the reasonable and consistent application of a fact-specific standard in a common-law system.

14. The 1998 Amendment is also confined to certain special cases, and defines with great precision the establishments that are entitled to benefit from the exception. The size and equipment limitations in the law are unambiguous, and can be applied with ease. The legislative history of the 1998 Amendment demonstrates Congress's view that the straightforward square footage criteria would curtail overreaching and abusive tactics by the collecting societies.

IV. NORMAL EXPLOITATION

15. The two central assessments therefore, are whether Section 110(5) conflicts with normal exploitation and unreasonably prejudices the legitimate interests of the copyright holder. First, limitations and exceptions to exclusive rights by definition deprive a copyright owner of potential compensation for certain uses of his or her work. If every time a copyright owner was deprived of any potential compensation, such deprivation constituted a conflict with normal exploitation, then Article 13 would have no meaning.

16. To determine what constitutes normal exploitation, the Panel must look to the ing socielo.4787yb 13 atedar o

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establishments. Owners of copyright in these works do not and have never expected direct revenue from secondary performances in such establishments.

20. In the4.

concerning the square footage of certain drinking, eating and retail establishments in the United States, intended to show the dramatic effect of the 1998 Amendment. For several reasons, however, these numbers are not relevant. They certainly do not serve as a useful basis for estimating the economic impact of the 1998 Amendment on right holders. They fail to account for the majority of the relevant factors that determine whether a right holder would be economically prejudiced at all by the exemption in the 1998 Amendment. Even assuming for the sake of argument the accuracy of the figures cited by the EC, in order to obtain a reasonable estimate of the number of establishments from which copyright owners have truly lost revenue as a result of the 1998 Amendment, one would have to:

- subtract from those gross totals the sizable number of establishments that do not play music;

- subtract from that number the establishments that rely on music from some source other than radio or TV (such as tapes, CDs, jukeboxes, or live music);

- subtract again for the number that were not licensed prior to the passage of the 1998 Amendment and which the collecting societies would not be able to license anyway regardless of the exemption;

- subtract once more for the establishments that would simply take advantage of the NLBA agreement practically identical to the 1998 Amendment if the statutory exemption were not available; and,

- finally, subtract again for the establishments that would prefer to simply turn off the music rather than pay the fees demanded by the collecting, societies.

While these figures are impossible to estimate with scientific precision, there is ample reason to believe that they represent substantial numbers of establishments.

26. Even a realistic estimate of the number of establishments from which copyright owners have lost revenue, however, would not present a true picture of economic harm to EC right holders. Whatever revenues could be collected from these smaller establishments would then have to be reduced again by the portion due to right holders in the EC, as opposed to all other right holders.

27. The EC makes no attempt to take these factors into account but rather merely asserts that copyright owners have been deprived of a significant source of income. Without providing any support for this assertion, the EC has not presented *prima facie* case that any prejudice suffered by EC right holders is unreasonable within the meaning of Article 13 of the TRIPS Agreement.

28. In light of the history of the 1998 Amendment, and the close similarity between that legislation and the voluntary agreement reached between the collecting societies and the NLBA in 1995, the EC's claim that copyright holders are suffering unreasonable prejudice is even more

music (CDs, records and tapes). Therefore, any revenue loss to the collecting societies as a result of Section 110(5) is necessarily a small fraction of the 14% of total revenues.

30. In light of the certainty provided by the precise limitations of the 1998 Amendment, the collecting societies can now efficiently redirect their licensing resources toward those establishments not eligible for the Section 110(5)(B) exemption, and thus compensate for any minor prejudice they might suffer. In fact, ASCAP has already stated its intent to do exactly this, as well as generate additional income by encouraging live and recorded music, for which there is no exemption. As noted in our first submission, even before the 1998 Amendment went into effect, ASCAP outlined its plan to "reverse the effects" of the legislation.

31. We believe that a thorough analysis of all the issues will lead you to conclude that both the homestyle exemption and the 1998 Amendment are fully consistent with the TRIPS Agreement. Thank you.

ATTACHMENT 2.3

RESPONSES OF THE UNITED STATES TO WRITTEN QUESTIONS

Section 110(5) is justified under the minor reservations doctrine. TRIPS Article 13 is relevant because it provides an explicit test under which a minor reservation must be evaluated. TRIPS Article 13 is a mechanism for evaluating what would, and what would not, be permissible under Berne. (For further discussion of this issue, please see U.S. Response to Panel Question 14.)

Categories of works

Q.3 Section 110(5)(B) applies to "performance or display of a nondramatic musical work". What was the objective of excluding works other than nondramatic musical works from the scope of application of Subsection (B)? When is "display" of a nondramatic musical work relevant? To what extent does Subsection (B) apply to categories other than musical works, in particular to audiovisual works?

Nondramatic works were the focus of Subsection (B) for two related reasons. First, the impetus for the enactment of Subsection (B) was complaints from business owners about the licensing tactics of the PROs. Since PROs do not license dramatic musical works, there were no complaints about the licensing of such works, and thus there was no reason to address these works in the amendment. Furthermore, in as much as the PROs do not license them, there is effectively no licensing of secondary performances of dramatic musical works in establishments affected by the exemption. To our knowledge, individual right holders do not license these types of secondary performances. Without any licensing taking place in this field, there was no need for Section 110(5)(B) to include such works.

A display of a nondramatic musical work is almost never relevant. The only occasion in which it would conceivably arise would be an audiovisual transmission in which sheet music was held up to the camera. It should also be noted that the display right, while present in U.S. law, is not required by the Berne Convention.

Subsection (B) does not to apply to any categories of works other than nondramatic musical works. The application of this provision to works other than nondramatic musical works, and in particular audiovisual works, turns on the construction of the word "embodying". Subsection (B) exempts only the performances of nondramatic musical works which occur in the process of an audiovisual transmission. While the establishment owner would not be required to pay a license fee for the performance of music during television programs, he or she would still be required to pay the copyright owners of the other works performed, such as cinematographic works. In practice, however, there is no licensing of the secondary performances of other types of works, including audiovisual works, to bars, restaurants and retail establishments.

Establishments covered

Q.4 Under Subsection 110(5)(B) of the U.S. Copyright Act, if (I) an establishment other than a food service or drinking establishment has less than 2,000 gross square feet of space or (ii) a food service or drinking establishment has less than 3,750 gross square feet of space, and if it wants to play nondramatic musical works, can it use any professional equipment or can it use only a homestyle -type equipment described in Subsection 110(5)(A)?

If an establishment falls within the 2,000/3,750 square footage limit, the equipment limitations of Subsection (A) do not apply.

Rights affected

Q.5 What types of transmissions are covered by Section 110(5)(A) and (B), in particular:

(a) Please specify separately in respect of Subsection (A) and (B) whether they cover:

Q.6(a) Are Internet transmissions covered by Section 110(5)(A) and (B)?

Internet transmissions would generally not be covered by Sections 110(5)(A) or (B) because those sections apply only to the public performance right. See answer to sub-question (b) below. It is unclear whether the performance aspect of an internet transmission would be covered by either Section 110(5)(A) or (B). Under Subsection (A), the courts have not determined whether a computer would be considered a "single receiving apparatus of a type commonly used in homes", although it should be observed that computers differ in many ways from the stereo and radio receivers contemplated by the legislative history of the homestyle exception and the case law of Section 110(5)(A). In the case of Subsection (B), most Internet transmissions will not originate from television or radio stations licensed as such by the FCC, nor will they be AV transmissions by satellite or cable systems. However, if an FCC-licensed broadcaster itself streams its signal on the Internet, the performance aspect of the broadcast might fall within Subsection (B).

(b) Paragraph 16 of the US submission says that "establishment owners generally must still seek a licence for the reproduction and possibly distribution rights implicated by Internet transmission". Please explain to what extent reproductions are created by a person who listens to a radio transmission "streamed" over the Internet and whether an authorization is required for such reproductions, as well as under what circumstances a person who receives radio transmissions "streamed" over the Internet would violate the distribution right. Please clarify whether any small stores or restaurants covered by Section 110(5) have acquired a reproduction or distribution licence for communicating by a loudspeaker music streamed over the Internet, and from whom such licences have been or could be obtained.

Temporary reproductions are created by all transmissions that traverse a computer network. This a technical requirement of sending digital information – the information is sent from one computer, and goes through numerous other computer servers before it reaches its final destination. Each one of the computer servers through which the information passes makes a copy of that information in the process of passing it on. Under U.S. law, these copies implicate an author's reproduction right.

The process of creating temporary reproductions occurs whether or not a transmission is "streaming". The term "streaming" means only that a reproduction of the entire work may not be created on the recipient's computer. Reproductions still occur as the information is transmitted across the network.

The distribution right could be implicated by copies of the work, or parts of the work, being deposited on the recipient's computers. This occurs with many streaming technologies, in which portions of the streamed work are "cached" on the recipient's computer as a backup or buffer to the portion being performed or displayed on-screen.

The United States has no information regarding whether or how business owners have obtained or could obtain licenses for the practices described above. The idea of a business owner performing broadcast works over a computer for the benefit of his or her patrons is still a novel one, with which we have no experience.

Even in the event that such forms of reception become more widely used, it is important to note that the owner of an establishment would receive no greater, or broader, ability to play music than he receives from his radio. In consultations prior to this Panel, the EC voiced concerns that this Subsection would apply to a variety of new music services that could become available over the Internet, such as on-demand music. However, since the Subsection is limited to transmissions "intended to be received by the general public," a

restaurant or small business owner would only have access to the same broadcasts he or she could get over a common radio or TV. Access to those same broadcasts over a computer, and only to those originating from the relatively small number of licensed radio stations, pose no additional threat to copyright owners.

(c) Assuming that a food service or drinking or other establishment would be required to acquire a reproduction and/or distribution licence for the public performance of music transmitted over the Internet, would this affect the scope to which it would be permissible to provide limitations to the public performance right in the law?

(a) The percentage of such establishments in which broadcast music was licensed before the 1976 Copyright Act;

The United States does not have detailed information regarding the pre-1976 period; however, in the House Report cited in the U.S. First Submission, (Exhibit US-1), Congress found that the majority of beneficiaries of the homestyle exemption were not licensed.

(b) The percentage of such establishments in which broadcast music was licensed since the entry into force of the 1976 Copyright Act until the entry into force of the Fairness in Music Licensing Act (for the last three years for which data are available);

According to surveys conducted by the National Restaurant Association in 1996-1997, 16% of table service establishments and 5% of fast food establishments in the United States were licensed before the 1998 Amendment. According to Census Bureau Data, in 1996 there were approximately the same number of table service and fast food restaurants in the United States. (Confidential Exhibit US-18, NRA letter reporting estimates based on Census Bureau figures of 183,253 table service restaurants in the United States and 185,891 quick-service restaurants). Thus, averaging 16% and 5%, it appears that approximately 10.5% percent of restaurants were licensed in the United States.

Information from ASCAP, the largest collecting society also indicates the relatively low level of licensing of establishments. In her testimony before Congress in 1997, Marilyn Bergman, the President of ASCAP stated that "the total number of ASCAP restaurant licensees does not exceed 70,000." Exhibit US-20, page 177. The Census Bureau figures cited above indicate that there are approximately 368,044 total restaurants (table and quick-service) in the United States. Thus, it appears that even the largest U.S. collecting society, ASCAP, estimates that it licenses no more than 19% of the restaurants in the United States.

(c) To what extent collecting societies license the use by such establishments of music other than broadcast music (such as live music and music performed by means of sound recordings or jukeboxes) (for the last three years for which data are available).

The United States has no data regarding the extent to which the collecting societies attempt to collect from establishments under 3750 or 2000 square feet for the use of live music, recorded music or jukeboxes.

Q.11 Please provide any available information or estimations on the revenues collected by the US collecting societies (for the last three years for which data are available), in particular:

(a) The total revenues from the licensing of public performance of music divided between the major categories of uses, including (a) broadcasting and retransmission within the meaning of Article 11*bis*(1)(I) and (ii) of the Berne Convention (b) public communication within the meaning of Article 11*bis*(1)(iii) and (c) other rights, including those under Article 11(1) of the Berne Convention;

ASCAP's annual reports for 1995-1997, attached as exhibit US-21, indicate that the revenues from broadcasting are by far its most significant source of revenue.

Revenues from the licensing of public performances of music by television broadcast amounted to 32%-33% of ASCAP's annual revenues in 1995, 1996 and 1997. Revenues from radio broadcasts amounted to 25%-26% of ASCAP annual revenues in each of those same years. The actual revenue figures are as follows (in millions):

	1995	1996	1997
Radio	$110	$120	$124.7
TV	$141.8	$158.4	$155.2
Total revenue	$436.8	$482.6	$482.1

Precise figures on the amount of revenues from public communication by loudspeaker are not available. The only available statistics are ASCAP's receipts for so-called "general and background licensing", which include all licensing revenues from food, drinking and retail establishments, as well as from licensees such as conventions, circuses, theme parks and sports events. It must be remembered that these general figures include all licensing revenues from such establishments, including revenues from the playing of recorded music and live bands. For this reason, these figures do not represent the potential loss of revenue from the Section 110(5)(A) or (B) exemptions, but most certainly represent an upper bound on those losses. For each of the years 1995, 1996 and 1997, general licensing revenue amounted to approximately 14% of ASCAP's total revenue.

	1995	1996	1997
General licensing	$63.2	$66.2	$67.3

The other sources of revenue reported by ASCAP in each of the three years include revenues from symphonies and concerts (1%), revenues from foreign collecting societies (25%-26%), and interest and member dues (1%).

(b) As regards the revenues collected from food service and drinking establishments and other establishments, what is the breakdown as between royalties for the public performance of broadcast music and the public performance of music from other sources;

food service and drinking establishment and other establishments that fall below and above the respective size limits provided for in Subsection (B);

To the extent that this information is available, it has been provided in the answer to question 10 and sub-questions (a) and (b), above.

(d) What is the likely impact of the amended Section 110(5) on the revenues collected earlier from such establishments.

The effect of the amended Section 110(5) on the revenues of the collecting societies is likely to be minimal. ASCAP collects just 14% of its total revenues from general licensees, including eating, drinking and retail establishments. Much of this revenue is for the public performance of live or recorded music, rather than broadcast music. Based on the data provided by the NLBA and other sources, it can be conservatively estimated that radio music accounts for a maximum of 28% to 44% of revenues from eating and drinking establishments. 28%-44% of 14% is equivalent to 3.9% - 6.2% of total revenues. In addition, this figure must be reduced further, since all restaurants and bars are not eligible for the Section 110(5) exemptions. Even using the EC's figure that 70% of all U.S. restaurants would be exempt under Section 110(5)(B), it appears that the exception for radio music will have a maximum effect on revenues of 2.7% - 4.3%.

Q.12 Can the US confirm the EC statement in paragraph 77 of its oral statement at the first substantive meeting that at least 25 per cent of all music played in the US belongs to EC copyright owners? If not, could the US give alternative estimates?

The United States does not agree with the EC statement. In particular, we cannot agree with the EC's implication that 25% of royalties collected in the United States are due to EC right holders. In fact, the United States is surprised by the EC's statement, given that a 1998 internal EC analysis of the economic effect of the homestyle exception on EC right holders estimated that just 6.2% of ASCAP revenues were distributed to all foreign collecting societies, and that just 5.6% of BMI revenues were due to all foreign collecting societies. Obviously, the percentage payable to EC collecting societies would be significantly less than these figures for total payments to all foreign collecting societies. European Commission, Examination Procedure Regarding the Licensing of Music Works in the United States of America (23 Feb. 1998).

Q.13 Please provide any market information concerning other countries that you would consider relevant to the case at hand.

Market conditions in the United States are the most relevant to the case at hand and thus the United States does not believe that market information concerning other countries is necessary to the resolution of this case. Right holders' legitimate expectations regarding the exploitation of their work in a particular market must be guided by the conditions in that market.

International treaty obligations

Q.14 Could the US explain how, absent express wording to that effect in the TRIPS Agreement, Article 13 of the TRIPS Agreement "constitutes the articulation" of the "minor reservation" doctrine under the Berne Convention? Does the US claim that Article 13 of the TRIPS Agreement can be invoked on its own or only through the "minor reservation" doctrine under the Berne Convention?

During the negotiation of Article 13 in TRIPS, the question posed by the Panel was discussed at length, and there were differing views regarding the need for Article 13. Eventually, the position that prevailed recognized that practically every country had small exceptions to exclusive rights

under Berne, either through statutory law, case law or practice, and that the inclusion of Article 13 was an effective way to measure the appropriateness of such exceptions.

In the draft of the TRIPS text from July 23, 1990 (W/76), this statement is made regarding Article 13: "In respect of the rights provided for at point 3, the limitations and exemptions, including compulsory licensing, recognized under the Berne Convention(1971) shall also apply *mutatis mutandis*

> a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

The Agreed Statement concerning Article 10 of the WCT further buttresses this view:

> It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention.

For example, the Australian copyright law provides a number of exceptions to the public performance right. Section 46 provides an exemption for public performances by wireless apparatus or by a record "at premises where persons reside or sleep, as part of the amenities provided exclusively for residents or inmates of the premises or for those residents or inmates and their guests". *Copyright Act 1968 (amended 1994), Section 46.* The commercial nature of this exemption is notable, as it applies to hotels and guest houses. Parliament of Australia, Standing Committee on Legal and Constitutional Affairs, "Don't Stop the Music!: a report on the inquiry into copyright, music and small business", 29 (May1998) (available at www.aph.gov.au/house/committee/laca/reports/copyrigh/index.htm. Australia also exempts public performances for educational purposes. *Id., Section 28.*

Under the Belgian copyright law, Section 22, an author "may not prohibit . . . communication to the public of a work shown in a place accessible to the public where the aim of the [] communication to the public is not the work itself". *Law on Copyright and Neighboring Rights 1994 (amended 1995), Art. 22(1).* Belgium also has an exception for the "free performance of a work during a public examination where the purpose of the performance is not the work itself, but assessment of the performer . . ." *Id.*

Under the Copyright Law of Finland, "A published work may also be publicly performed in events where the performance of such works is not the main feature, provided that no admission fee is charged and the event is not arranged for profit". *Copyright Act (amended 1997) Law 446/ 1995, Art. 21.* The same law also contains an exemption for public performances "in connection with religious services and education". *Id.* Denmark also provides an exception for public performances of non-dramatic works on radio or television "on occasions when the performance of such works is not the main feature of the event, provided that no admission fee is charged and the event is not for profit". *Act on Copyright 1995, Sec. 21.*

New Zealand exempts public performances of musical works at educational establishments. *Copyright Act 1994, Section 47.* The Philippines excepts public performances for educational and charitable purposes. *Intellectual Property Code of the Philippines, Sec. 184* (1997). India, in addition to educational exemptions, also exempts "the performance of a literary, dramatic or musical work by an amateur club or society, if the performance is given to a non-paying audience . . ." *India Copyright Act 1957 (amended 1994), Sections 52(l), 52(I).*

Canada provides a number of exceptions to the public peramende 0 TD /F0 11ii Tw ((or educTw (India477j

Article 13 requires that exceptions be limited to certain special cases. The Oxford Dictionary defines "certain" as "determined; fixed" and "definite". *The New Shorter Oxford Dictionary* (ed. Lesley Brown), 364 (1993). The word "special" is defined as "exceptional", "distinguished from others of the kind by a particular quality or feature; distinctive in some way", "appointed or employed for a particular purpose or occasion", "having an individual or limited application or purpose", and "containing details, precise, specific". *Id*. at 2971. These definitions contain a significant degree of overlap, and the key criterion that emerges from the requirement that exceptions be limited to "certain, special" cases is that the exception be both well-defined and of limited application. One report of the TRIPS negotiating history explains as follows: "When these exceptions are invoked, they may from now on be submitted to the general test of Article 13, which should be interpreted on the basis of Article 9(2) of the Berne Convention. The two tests contained in that Article are cumulative. In addition, any exception must be clearly delineated so as to apply only to "certain special cases". *Gervais, at 90*.

The negotiating history of Berne Article 9(2) reinforces this view. The original text proposed for Article 9(2) listed three areas of permissible exceptions, the third of which was "certain <u>particular</u> cases, provided (I) that reproduction is not contrary to the legitimate interests of the author, and (ii) that it does not conflict with a normal exploitation of the work". The Conference decided, however, that a more general formula for exceptions was preferable, and instead of the three areas of exceptions, adopted a proposal of the United Kingdom to modify the text to allow exceptions "in

and those formerly on public assistance, and thus are an essential mechanism by which millions enter the economic and social mainstream. *The State of Small Business: Report of the President,* (U.S. GPO: Washington) 3 (1998).

Important public policy concerns also support the exception in Section 110(5)(B). With respect to many of the businesses exempted, the same concerns relating to the social importance of small businesses apply. *E.g.*, Congressional Record (Oct. 7, 1998); Letter from Representative James Sensenbrenner, Jr. to Members of Congress, *"Key small business vote next week"* (Mar. 20, 1998). In addition, the legislative history of this provision is replete with concern over abuses of the PROs. By exempting small businesses, many of whom the collecting societies had already agreed to exempt in the context of the NLBA Agreement, Congress believed that it was resolving the issue of abusive licensing practices without causing any unreasonable prejudice to right holders.

right is provided, however, the relative economic importance of that exclusive right would be a relevant factor in the Article 13 analysis.

Actual revenues from exclusive rights are also important in the Article 13 analysis. Marketplace realities guide the expectations of benefit of copyright owners. In determining the scope of normal exploitation, and unreasonable prejudice it is highly appropriate to look at marketplace realities. The concepts of normal exploitation and unreasonable prejudice cannot be determined in the abstract.

Q.19

Broadcasting is only one means by which a work may be publicly performed. The copyright owner generally has the exclusive right under U.S. copyright law to authorize or prohibit that broadcast. The right of public performance in Section 106 of the U.S. Copyright Act includes the broadcasting right in Berne Article 11*bis* as well as other types of public performances.

II. REPLIES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL ADDRESSED TO BOTH PARTIES

Q.1 Please explain the extent to which the case law concerning Section 110(5) cited in your respective submissions is relevant for the purposes of interpreting the present subsection (A) of that paragraph.

The United States believes that the case law is relevant because Section 110(5) was TRIPS consistent even before non-dramatic musical works were excluded from its scope. Moreover, the case law also provides guidance as to the bounds of the exception with respect to works other than non-dramatic musical works.

Categories of works

Q.2 The Panel understands that the text of the original Section 110(5) is identical to that of the present subsection (A) minus the words "except as provided for in subparagraph (B)". The preparatory work reproduced in exhibits EC-3 and US-1 (H.R. Rep. No. 94-1476 (1976)) explains that the provision "applies to performances and displays of all types of works". Paragraph 31 of the EC submission and paragraph 9 of the US submission (and certain other paragraphs) contain an interpretation according to which this text, as contained in subsection (A), is intended to exclude from its scope "nondramatic musical works". Please clarify your interpretation of the text of this provision, on the one hand, as part of the original paragraph, and, on the other hand, as part of subsection A, and, to the extent that, in your view, the text should be understood differently in these two contexts. Explain why.

With respect to the original (homestyle) exemption, the precursor to subsection A, as noted, the intent was to exempt the public performance of all types of work, within the other limitations of the exemption. The 1998 Amendment narrowed the scope of the homestyle exemption. Subsection B refers to "nondramatic musical works" and the scope of subsection A is specifically limited to whatever is not detailed in subsection B. *See also* U.S. Response to Panel Question 3 to the U.S. Thus, given that nondramatic musical works are covered under Subsection B, they are not included within Subsection A. The United States observes that on this particular question of fact – the scope of Section 110(5) – there is no dispute between the parties to the case.

Q.3 What is the definition of the term "nondramatic musical work" in the context of Section

With respect to

Licensing practice

Q.4 Paragraph 4 of the US oral statement at the first substantive meeting states that Section 110(5) is limited to only certain secondary uses of broadcasts of public performances, for which the right holder has already been compensated for the primary performance. In which way, if any, do licensing arrangements between collective management organisations (CMOs) and broadcasting organizations in the US or the EC take into account the potential additional audience created by means of further communication by loudspeaker etc. of broadcasts to the public within the meaning of Article 11*bis*(1)(iii) of the Berne Convention?

The United States does not assert that licensing arrangements between broadcast organizations and the collecting societies include royalties for secondary performances by the receiving public. In assessing the economic impact of Section 110(5), however, and specifically the extent of prejudice to a copyright owner, the Panel should take note that the copyright owner has already been compensated once for the broadcast or radio transmission of a particular public performance.

Interpretation of treaty obligations

Q.5 What is the legal nature of materials including "General Reports" of Diplomatic Conferences of the Berne Convention countries in light of Article 31 of the Vienna Convention on the Law of Treaties (VCLT)? Are they " subsequent agreements on the interpretation or application" in the meaning of Article 31(3)(a), "subsequent practice" in the meaning of Article 31(3)(b), "rules of international law applicable between the parties" in the meaning of Article 31(3)(c), or a "special meaning … given to a term if its established that the parties so intended"?

The General Reports of Diplomatic Conferences of the Berne Convention countries may, depending on the context, be considered to be preparatory work for revisions to the Berne Convention, or evidence of the circumstances surrounding the adoption of the text of the revisions to the Berne Convention; thus they would be analyzed under Article 32 of the Vienna Convention. They are not "agreements on the interpretation or application" of the Berne Convention, they do not represent a widespread "subsequent practice" of the parties to the Convention, and they do not as such constitute "rules of international law applicable between the parties." Thus they do not fall within any of the categories listed as Article 31(3)(a), (b) or (c).

Q.6 In your view, what is the relationship between Article 13 of the TRIPS Agreement and Article 11*bis*(2) of the Berne Convention? Does Article 13 of the TRIPS Agreement prevail over the exception in Article 11*bis*(2) with respect to the exclusive rights conferred by Article 11*bis*(1)(I-iii) of the Berne Convention in the sense that when the three conditions of Article 13 are met, no requirement to pay equitable remuneration arises? Do the requirements of Article 11*bis*(2) of the Berne Convention prevail as a *lex specialis* over the requirements of Article 13 of the TRIPS Agreement, in the sense that if equitable remuneration is paid, there is no need to comply with the three-conditions test under Article 13? Do the requirements of Article 13 and Article 11*bis*(2) apply on a cumulative basis in the sense that, on the one hand, even if the three-condition test of Article 13 is fulfilled, there is an additional, fourth requirement to pay equitable remuneration, and on the other hand, even if equitable remuneration is paid consistently with Article 11*bis*

licenses may be much broader than an exception, and are a different mechanism for limiting rights than the minor reservations doctrine.

Article 11*bis*(2) is consistently described as a provision authorizing compulsory licenses:

> - "Long discussions – in the subcommittee as in the General Committee – was caused by para. 2 [of Article 11*bis*] which enables Union countries to introduce obligatory licenses in favor of the radio." (*Report on The Brussels Conference for the Revision of the Berne Convention*, Dr. Alfred Baum, Zurich, 1948.)
>
> - "This provision [Article 11*bis*(2)] allows member countries to substitute, for the author's exclusive right, a system of compulsory licenses." (WIPO Guide to the Berne Convention, 70.)
>
> - "The reference to "conditions" in article 11*bis*(2) is usually taken to refer to the imposition of compulsory licenses, but the form

Q.8 Has the "minor exceptions" doctrine under the Berne Convention, and especially in the context of Articles 11*bis*(1) and 11(1) of the Berne Convention, acquired the status of customary international law? What is the legal significance of the "minor exceptions" doctrine under the Berne Convention in the light of subparagraphs (3)(a-c) or paragraph (4) of Article 31 of the VCLT or in the light of Article 32 of the VCLT? Has the "minor exceptions" doctrine or any other implied exceptions been incorporated, by virtue of Article 9.1 of the TRIPS Agreement, together with Articles 1-21 of the Berne Convention into the TRIPS Agreement? Please explain.

The "minor exceptions" doctrine under the Berne Convention has not acquired the status of customary international law. The doctrine under the Berne Convention constitutes subsequent practice of Berne Members under Vienna Convention Article 31(3)(b). See U.S. Response to Panel Question 16 to the U.S. regarding minor exceptions in the laws of other Berne members. The minor exceptions doctrine is also explicitly referenced in the preparatory work of the Berne Convention, which constitutes a supplementary means of interpretation under Article 32 of the Vienna Convention. See U.S. response to Panel Question 14 to the U.S.

The "minor exceptions" doctrine has been incorporated into TRIPS by the specific

TRIPS Agreement. That is not to say that the evolution of market conditions is irrelevant. It is possible that exceptions justifiable under Article 13 at one point in time may become unacceptably broad with the passage of time and changes in the market. It is also possible that an exception that fails to meet the Article 13 criteria at a certain time may in fact meet those criteria as market conditions evolve.

It seems highly speculative to attempt to determine whether the conditions of Article 13 are met with respect to any potential market situation. One could also hypothesize changes in the market that would affect the degree of prejudice caused by an exception to exclusive rights. The WTO dispute settlement system is not based on such speculation. To look at anything other than the current market situation would be tantamount to reading into TRIPS a requirement that exceptions avoid any potential conflict with normal exploitation of a work and avoid even the possibility of unreasonable prejudice to the right holder. The plain text of Article 13, however, provides that exceptions must be evaluated by the extent to which they "do" not conflict with a normal exploitation and "do" not cause unreasonable prejudice.

Q.13 To what extent subsequent technological and market developments (e.g. new means of transmission of or increased use of background music or television) are relevant for the interpretation of the conditions under Article 13 of the TRIPS Agreement?

Technological and market developments are relevant to the interpretation of the conditions under Article 13 of TRIPS to the extent that they relate to a particular case at a particular time. The Article 13 analysis should be based on the current state of technology and market development, as opposed to speculation about future possibilities. See U.S. Response to Question 10, above.

Q.14 Is it justified to define the three conditions exclusively by reference to a particular market, or is a comparative analysis of licensing practices in other Members with similar economic conditions warranted?

TRIPS Article 1.1 provides guidance on this question, and provides that WTO Members are "free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice". This provision would mean little if the reasonableness of a country's exceptions were determined in part by foreign right holders' licensing practices in other Members. Similarly, Article 5(2) of Berne provides that "apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed." The spirit of this provision is that, except where Berne specifically provides otherwise, countries are free to determine the content of their own national laws regarding the extent of copyright protection.

A Member's national market is the most important determinant of normalcy and reasonableness with regard to that Member. It cannot be assumed that right holders have identical interests in various WTO Members, even where similar economic conditions prevail. There is no support in the TRIPS Agreement for requiring that any exception to exclusive rights be justified not only by reference to the prejudice it might cause to right holders' in the market that it would affect, but also by reference to the prejudice it would cause in theory if it were imposed in a completely separate market.

A comparative analysis of other WTO Members is particularly inappropriate with respect to the issue of "certain, special cases." Local history and tradition may play a major role in determining whether a particular country considers a case sufficiently special to warrant an exception to an exclusive right. TRIPS certainly does not require that other Members share the same social values.

Q.15 Under the third condition of Article 13, should the concepts of "unreasonable

holders? In the latter case, what could be the normative concern at issue? In addition to an empirical analysis of prejudice to legitimate interests, how could such a normative element be taken into account in defining the threshold of the third condition of Article 13?

Existing, legally guaranteed entitlements to an exclusive right are one factor in defining the concepts of unreasonable prejudice and legitimate interests. Existing entitlements determine the benefits that a right holder might legally expect from his work, and thus provide helpful guidance in evaluating prejudice to the right holder's interests. In addition, the concepts of unreasonable prejudice and legitimate interests do also connote an aspect of normative concern to right holders.

Q.16 What is the extent of "reasonable" prejudice to the legitimate interests of rights holders that is permissible under the third condition of Article 13?

The extent of prejudice that may be deemed reasonable under TRIPS Article 13 must be determined on the facts and circumstances of each case, and cannot be established in the abstract due to the myriad potential factors that may influence the inquiry in any particular instance. To determine whether prejudice is unreasonable, the Panel should undertake a fact-intensive inquiry into the extent of the prejudice suffered by right holders subject to an exception, and then must ultimately balance these facts to reach a conclusion based on reason, rather than on a *per se*

The context, object and purpose of Article 13 are also relevant to this discussion. The TRIPS Agreement is a trade agreement, and its purpose was to "reduce distortions and impediments to international trade". TRIPS, preamble. The Agreement was negotiated against the backdrop of a wide variety of national systems, and was intended to contribute to "the mutual advantage of producers and users" and "a balance of rights and obligations". As mentioned above, the drafters also intended that Members would have flexibility in implementing the Agreement within the context of "their own legal system and practice". These guiding principles support the position that the analysis of the conditions of Article 13 must be grounded in local market realities, and in the actual practice and experience of right holders and users in the country concerned.

Q.6 In paragraph 32 of its First Written Submission the US seeks to justify the "business exemption" by saying that it adds only a "small number of establishments" to those benefiting from the pre-existing homestyle exemption. Would the US please provide an estimate of this additional "small number of establishments"? If the US Congress were to further increase the thresholds, would the US then seek to justify the new version under Article 13 TRIPS by arguing that most of the establishments covered by the newly-formulated exemption were exempted under the pre-existing version?

See U.S. Response to Panel Questions 9-10 to the United States for the data available to the United States. The United States will not speculate concerning the hypothetical sub-question posed in the above question.

Q.7 What percentage of establishments would have to be excluded from protection under Article 110(5) US Copyright Act before it ceased to qualify for exemption under Article 13 TRIPS according to the US ?

See U.S. Response to Question 16 from the Panel to the United States and the European Communities.

Q.8 Could the US please explain why the playing of copyrighted works originating from radio or TV broadcasts may be excluded from protection and not the playing of copyrighted works directly from tapes or cassettes?

See U.S. Response to Question 7 from the Panel to the United States.

Q.9 Could the US please provide a copy of the NLBA licence which it claims at paragraph 13 of its First Written Submission is based on similar criteria to those used in Section 110(5)?

See U.S. response to Panel Question 1 to the United States and exhibit US-16.

Q.10 In paragraph 4 of its Oral Statement, the US states that the Article 110(5) "exception is limited to only certain secondary uses of broadcasts of public performances, for which the right holder has already been compensated for the primary performance." Does the US really consider that payment of a royalty for the "primary performance" may be considered to also compensate for "secondary uses"?

See U.S. response to Panel Question 4 to the United States and the European Communities.

Q.11 Please explain why you consider the other exception provisions of TRIPS (Articles 17, 26(2) and 30) to be relevant context for the interpretation of Article 13 and what consequences you draw? What is the relative importance of these other provisions of TRIPS and the exceptions, reservations or limitations allowed under the Berne Convention as context for the interpretation of Article 13?

Under Article 31 of the Vienna Convention, other provisions of a treaty are part of the context for the purpose of interpreting a particular provision. In considering the interpretation of Article 13 of TRIPS, it would be inappropriate not to consider three other similarly worded provisions governing exceptions in the Agreement. Generally under TRIPS, the permissibility of exceptions is determined by similar (though not identical) standards in relation to copyrights, patents, industrial designs as well as trademarks. These exceptions reinforce the principle that the TRIPS Agreement was intended to balance the interests of producers and users of intellectual property. There is no basis in the negotiating history of TRIPS to assume that WTO Members used similar wording, but nevertheless intended to permit exceptions of radically differing scope, with respect to different types of intellectual property rights.

Moreover, Articles 30 and 31 reinforce the point made in U.S. Response to Panel Question 6 to the United States, in that they reflect the clear distinction in intellectual property between exceptions (for which equitable remuneration is not required) and compulsory licenses (for which equitable remuneration is required).

ATTACHMENT 2.5

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

(24 November 1999)

Table of Contents

I.

5. The EC also argues that two particular cases, *Edison Bros.* and *Claire's Boutiques*, are "illustrative" of a judicial trend toward broadening the homestyle exemption.[5] Far than being illustrative, however, these two cases are the only decisions allowing chain stores to take advantage of the homestyle exception. Furthermore, as explained in the U.S. first submission, these cases are consistent with the body of U.S. case law under Section 110(5), in that they involved the use of

C. NEGOTIATING HISTORY OF THE TRIPS AGREEMENT

13. The negotiating history of the TRIPS Agreement further supports our conclusion that Article 13 applies to Berne rights. As explained by one commentator: "Article 13 allows a dispute settlement panel to review exceptions, including the so called 'small exceptions', to ensure that they pass the test. . . . When these exceptions are invoked, they may from now on be submitted to the general test of Article 13".[14] The United States has already elaborated on the negotiating history of TRIPS in its Response to the Panel Question 14 to the United States and in its first submission.

14. In its Response to Question 10 from the Panel, the EC has cited its opening position in the TRIPS negotiations as evidence of the non-applicability of Article 13 to Berne rights. During the TRIPS negotiations, the EC had taken the position that the exceptions article in TRIPS should not apply to Berne rights, but rather should apply only to so-called "Berne-plus" rights set forth in particular provisions of TRIPS.[15] The contrast between the EC negotiating position and the final text of Article 13, the application of which is not limited to specified exclusive rights, demonstrates that if WTO Members had intended Article 13 to apply only to certain exclusive rights under TRIPS, they would have specified that result. Rather, Article 13 was phrased generally, does not indicate any sort of limited application, and was intended to apply to all exclusive rights.

D. RELATIONSHIP WITH THE BERNE CONVENTION

15. The U.S. view that Article 13 sets forth the standard governing all exceptions or limitations to exclusive rights is consistent with the context of Article 13, including TRIPS Article 2.2. It does not imply that TRIPS reduced the level of protection below the level permissible under Berne. Even though not explicitly stated, the Berne Convention permits minor exceptions to the exclusive rights provided for therein. As acknowledged by the EC in its response to Panel Question 11 to the EC, and Panel Question 5 to the US and EC, the minor reservation doctrine is well-established under Berne.[16]

16. Minor exceptions to the public performance right appear in the copyright laws of very many, if not virtually all, Berne members. Under Article 31 of the Vienna Convention, subsequent practice is to be "taken into account, together with the context" in interpreting treaty text.[17] Subsequent practice is important, according to the International Law Commission, because it "constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.[18] According to the Appellate Body, subsequent practice under Article 31(3)(b) includes practice that is "concordant, common, and consistent".[19] Although the United States has not been able to review the copyright laws of all Berne members, a large number of exceptions were cited in our response to Panel Question 16 to the United States. Additional countries that permit exceptions to the public performance right are cited in Exhibit US-22. This widespread practice of allowing minor exceptions to this particular Berne right illustrates its common acceptance among Berne members.

17. Relevant negotiating history of the Berne Convention has already been reviewed in this proceeding, and also clearly establishes the permissibility of minor reservations under Berne. Under

Article 32 of the Vienna Convention, preparatory work of a treaty may be used to confirm the meaning of the text and context or to clarify ambiguities. The negotiating history regarding minor exceptions confirms that Berne members intended that exceptions be allowed to the exclusive rights provided in Articles 11 and 11*bis*.

18. Contrary to the EC's assertions, minor reservations under Berne are not limited to either: (a) the specific noncommercial uses listed in the General Reports – "religious ceremonies, performances by military bands and the requirements of child and adult education"; or (b) exceptions existing in the legislation of the member states of the Berne Union in 1967, at the latest.

19. First, there is no requirement that exempt uses be noncommercial. Although, as a general rule, noncommercial uses may be less prejudicial to right holders than commercial ones, this is not an absolute rule. Even the uses discussed in the General Reports are not necessarily noncommercial; for example, there are many educational institutions or training programs that are run for profit. Several of the public performance exceptions in EC member state laws exempt educational activities without specifying that the educational institution must be nonprofit. Exemptions in the laws of certain third parties to this dispute are also applicable to commercial uses. These include the Australian law that exempts secondary performances in hotels and guest houses, and the Canadian law that exempts performances at agricultural fairs and exhibitions.[20] These exceptions demonstrate that the commercial nature of a use cannot be dispositive.

20. Furthermore, the discussion of the minor reservations doctrine in the General Reports precludes the notion that the doctrine was limited to the exceptions specifically mentioned in those Reports. The General Reports only list several traditional exceptions to the public performance right of Article 11, such as military bands and religious ceremonies. However, the Reports also make certain to note that the minor reservation doctrine is also applicable to Article 11*bis*, 13 and 14, but do not provide any examples of permissible exceptions to those rights.[21] It must have been intended that the doctrine apply to exceptions not specifically listed in the Reports, otherwise that language would have no meaning.

21. Second, the EC's argument that the exceptions allowable under the minor reservations doctrine must be frozen in 1967 fails for a number of reasons. Notably, it is explicitly contradicted by the language in the Agreed Statement concerning Article 10 of the WCT, which states "It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention." If the exceptions permissible under Berne were frozen in 1967, then this language would effectively contradict Article 1 of the WCT, which states that nothing in the Treaty shall derogate from the protection afforded under Berne.

22. Construing the minor reservation doctrine to apply only to exceptions in existence in 1967 also creates unfair results in regard to developing countries, and renders the Berne Convention less applicable in the modern world. Many developing countries that are now members of Berne had no copyright law at all, or only a rudimentary one, in 1967. If the EC's argument that countries can only "grandfather their pre-1967 exceptions" when acceding to Berne is accepted, then most developing countries will not be allowed to have any exceptions at all. In addition, the flexibility of the principles of copyright protection represented in Berne would be drastically undermined were they not allowed to respond to changes and developments in technology as well as practice. As provided in the WCT, countries must be able to appropriately extend and adapt exceptions to fit the realities of

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[20] See U.S. response to Panel Question 16 to the Panel.

[21] Records of the Intellectual Property Conference of Stockholm, WIPO, Geneva, 1971, paras. 209-210, p. 1166.

a changing world. The EC's interpretation of Berne, freezing it in 1967, would deprive it of much relevance in today's intellectual property environment.

E. SIGNIFICANCE OF BERNE ARTICLE 11*BIS*(2)

23. We note that there has also been some discussion, in third party submissions and in the questions from the Panel, about the relevance of Article 11*bis*(2) to the permissibility of Section 110(5). We reiterate our position, more fully articulated in the U.S. Response to Panel Question 6 to the US and EC, that Article 11*bis*(2) has no bearing on Section 110(5). Article 11*bis*(2) merely authorizes a country to substitute a compulsory license, or its equivalent, for an exclusive right under Article 11*bis*. Neither the negotiating history of Berne, nor the subsequent

flexible mechanism to evaluate numerous different exceptions in many different contexts and legal systems. It does not impose any "per-se" rules with respect to any of the criteria in the Article. Rather, the permissibility of exceptions under TRIPS Article 13 must necessarily be determined on a case-by-case basis.

28. In such an analysis, the market of the country imposing the exception is the most relevant. The United States and the EC are apparently in agreement regarding this issue.[24] Moreover, while both actual market conditions as well as potential market may be relevant to the analysis under Article 13, actual conditions are of primary importance. An analysis based on assumptions about a potential market is necessarily less reliable and subject to speculation. The EC, for example, argues that the Panel should consider the alleged 70% of exempt restaurants as the potential market for its right holders – even though there is no possibility that all such restaurants actually play radio music and would be licensed by ASCAP or BMI. The only way to avoid the danger of arbitrariness is to accord the greatest weight to actual existing market conditions.

B. SECTION 110(5)(A) AND (B) APPLY TO CERTAIN, SPECIAL CASES

29. As discussed in the U.S. Response to Panel Question 17 to the U.S., both Section 110(5)(A) and (B) represent exceptions that apply in certain special cases. The essence of this requirement is that exceptions be well-defined and of limited application. Both Sections 110(5)(A) and (B) are sufficiently definite. Section 110(5)(A) is defined by the equipment limitations, and the subsequent case law which has consistently enforced square footage limitations. Section 110(5)(B) is clearly defined in the statute by square footage and equipment limitations. Furthermore, to the extent that the purpose of the exception is relevant, it is only required that the exception have a specific policy objective. TRIPS does not impose any requirements on the policy objectives that a particular country might consider special in light of its own history and national priorities. In this case, both exceptions rest upon sound public policy objectives related to the social benefits of fostering small businesses and preventing abusive tactics by the collecting societies.

C. NEITHER SECTION 110(5)(A) OR (B) CONFLICTS WITH NORMAL EXPLOITATION

30. Neither Section 110(5)(A) nor Section 110(5)(B) conflict with the normal exploitation of a work. Section 110(5)(A), almost by definition, cannot conflict with normal exploitation, as it was intended precisely to exempt those establishments which would not have otherwise justified a commercial license.[25]

31. In evaluating normal exploitation, the Panel must look at the scope of the exception with respect to the panoply of exclusive rights, as well as with respect to the specific right which it exempts. As more fully explained in US Response to Panel Question 18 to the U.S., both perspectives are relevant. While the impact on the particular right affected is relevant, the proportion of that right to the rest of the exclusive rights is equally so. Notably, the TRIPS Article 13 test does not say "conflict with the normal exploitation of an exclusive right", but refers to the exploitation of the "work" as a whole.

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[24] EC Response to Panel Question 8 to both parties.

[25] The EC appears to find a contradiction in the fact that the PROs did not generally license small business establishments, and that there were many complaints about their licensing practices being abusive with regard to such establishments. No such contradiction exists. The PROs did not attempt to license the vast majority of small businesses. Nevertheless, there were complaints that when the PROs did attempt to obtain licenses from any business, they often did so in an arbitrary and abusive manner, without regard for existing law or good faith business practices. Small business, generally being the least sophisticated and having the fewest resources, are the least able to respond to such tactics or defend their rights.

D. NEITHER SECTION 110(5)(A) OR (B) CAUSES UNREASONABLE PREJUDICE

32. Section 110(5)(A) and (B) do not cause right holders unreasonable prejudice, as the economic impact of the exceptions is minimal. The discussion below focuses primarily on Section 110(5)(B), since the EC aims most of its criticism, and the minimal empirical analysis it has conducted, at this subsection. It can be assumed, however, that the impact of subsection (A), the homestyle exemption, is a mere fraction of the numbers discussed below, as it affects fewer and smaller establishments than subsection (B). The United States also observes that, despite the more than 20 year history of the homestyle exemption, the EC has not provided any facts or data showing any prejudice to EC right holders as a result of the old homestyle exemption or amended Section 110(5)(A).[26]

1. Section 110(5)(B) does not cause unreasonable prejudice because any actual harm to EC right holders is minimal

33. The amount of prejudice resulting from Section 110(5)(B) is not unreasonable. In our first submission, the United States noted the irrelevance of the figures provided by the EC, and discussed the factors by which those figures must be reduced to yield a reasonable approximation of losses to EC right holders. The following empirical analysis supplements that already provided by the United States,[27] and is based on additional information recently received. It is designed to rebut the EC's assertions, particularly those made in its responses to the Panel's questions, that Section 110(5) is likely to cost EC right holders "millions" of dollars. The analysis demonstrates that the maximum loss to EC right holders of distributions from the largest U.S. collecting society, ASCAP, as a result of the Section 110(5) exemption is in the range of $294,113 to $586,332 – far less than the "millions" of dollars claimed by the EC. Especially in light of the size of the U.S. and EC markets, this figure is truly a minimal one, and does not establish any unreasonable degree of prejudice.

(a) Starting-point in the analysis: total royalties paid to EC right holders: $19.6 million - $39 million

34. To determine the degree of prejudice to EC right holders from the exemption, the logical starting-point is the total amount paid to EC right holders by the collecting societies. The EC has recently provided figures from ASCAP purporting to show that EC right holders received an average of $39,045,833 from ASCAP for the years 1996, 1997 and 1998.[28] According to the EC data, this figure of 39 million dollars represents an average of 13.7% of ASCAP's total distributions of domestic income for those three years. It must be noted here that in an earlier analysis conducted by the EC to determine the harm to EC right holders from Section 110(5) before it was amended in 1998, the EC used a figure of "less than 5%" for 1996, and noted that ASCAP's distributions to *all* foreign collecting societies were just 6.2%.[29] The EC estimate of "less than 5%" appears to be based on the figure "total domestic distributions for EU societies" (19,586,000)[30] as a percentage of total ASCAP distributions for 1996 (397,379,000)[31] Given the inconsistency in the EC methodology, the United States' analysis below will proceed based on a range for ASCAP's total payments to EC right holders of 19.6 million to 39 million.

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[26] See EC Response to Question 3 asked by the Panel.

[27] The data provided in the following analysis reflects that provided in the U.S. Responses to the Panel's Questions 9-11 to the Un

(b) After reducing for amount attributable to general licensing – losses to EC right holders: $3.7 - $7.4 million

35. To determine the potential impact of Section 110(5) on total payments to EC right holders, the figure for such total payments must be reduced to account for the fact that a relatively small proportion of licensing revenue collected in the United States is attributable to music played in

(d) After reducing to account for licensing revenue from general licensees that do not play the radio – losses to EC right holders: $.56 million - $1.13 million

39. In addition, it is obviously important to take into account the fact that much of the revenue from general licensees that qualify as establishments is not attributable to the playing of radio or TV music, but rather to public performances of music from media other than radio or TV broadcasts, such as tapes/CDs, live bands, and jukeboxes. According to the National Restaurant Association, approximately x% of all restaurants play the radio[36], but not necessarily exclusively (they may also sometimes use live bands or CDs, etc.). According to the National Licensed Beverage Association, 28% of its members play the radio, but again not necessarily exclusively. Taking an average of these two roughly comparable estimates, the United States assumes that 30.5% of establishments play radio music.

40. It is important to note that, given that establishments often play music from more than one source, this estimate – 30.5% of establishments that play the radio – does not correspond with the percentage of licensing revenue attributable to the playing of radio music, and indeed would significantly overstate such revenue. Nevertheless, for the purpose of deriving a conservative estimate and in light of the limited data available, the United States assumes for the sake of only this analysis that 30.5% of licensing revenue is attributable to the playing of radio music. Correspondingly, the losses to EC right holders from the Section 110(5) exemption for radio music must be reduced to this amount, and would range from $564,517 (30.5% of 1,850,877) to $1,125,398 (30.5% of 3,689,831).

(e) After reducing to account for licensing revenue from general licensee establishments that play the radio and meet size limitations of Section 110(5): losses to EC right holders: $294,113 to $586,332

41. Certainly the calculation of losses to EC right holders must also take into account that many eating, drinking and retail establishments that play radio music do not meet the square footage limits of Section 110(5)(B). Based on figures provided by the National Restaurant Association, 65.5% of restaurants meet the square footage criteria of the statute.[37] The United States has no data regarding the percentage of retail establishments that would meet the square footage criteria; however, the EC has presented a Dun & Bradstreet study commissioned by ASCAP purporting to demonstrate that 45% of retail establishments are exempt under Section 110(5)(B).[38]

42. According to the EC's own exhibit EC-16, Dun & Bradstreet estimated that there were 683,783 retail establishments in the United States, and 364,404 eating and drinking establishments.

43. Applying 45% to the total number of retail establishments (683,783) results in a total of 307,702 retail establishments that meet the square footage criteria of Section 110(5). Applying 65.5% to the total number of eating and drinking establishments (364,404) results in a total of 238,685 such establishments that meet the square footage criteria of Section 110(5). The total number of establishments (both retail and eating and drinking) meeting the square footage criteria of the statute is thus 546,387, which is 52.1% of all establishments. The loss to EC right holders is further reduced to $294,113 (52.1% of $564,517) to $586,332 (52.1% of $1,125,398).

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[36] Confidential Exhibit US-18.

[37] The EC has presented a different figure, and estimates that 70% of eating and drinking establishments fall within the square footage limitations of the statute.

[38] EC first submission, para. 51; Exhibit EC-16.

(f) The U.S. Methodology is Conservative

44. The above figure is a conservative one, based on available information. For a number of reasons, the true amount of economic prejudice to EC right holders is likely to be even less than $294,113 to $586,332. For example, the United States has assumed that where 30.5% of establishments play the radio, 30.5% of licensing revenue is attributable to radio-playing. This figure is obviously too high, given the large proportion of establishments that play music from more than one type of media. In addition, the United States assumed that the 65.5% of restaurants (and 45% of retail establishments) that fit within the square footage limits of the exception accounted for a 65.5% (and 45%) loss of revenue. In fact, the exempt restaurants and retail establishments are necessarily smaller establishments, and almost certainly represent a smaller proportion of licensing revenue.

45.

2. Right holders themselves have viewed size limits comparable to Section 110(5)(B) as reasonable and voluntarily supported them

49. In considering whether the passage of Section 110(5)(B) has caused right holders any

ATTACHMENT 2.6

ORAL STATEMENT OF THE UNITED STATES AT THE SECOND MEETING WITH THE PANEL

(7 December 1999)

I. INTRODUCTION

1. The exceptions permissible to exclusive rights, and the standard by which they will be governed are issues of tremendous importance under TRIPS. Article 13 of TRIPS is a key provision that limits WTO Members' ability to restrict exclusive rights, but also provides them with vital flexibility in implementing their TRIPS obligations. The proper application of this standard to Section 110(5)(A) and (B) of the U.S. Copyright Law results in a conclusion that these provisions are fully consistent with the TRIPS Agreement.

II. FACTUAL ISSUES

2. In our second submission, the United States addressed several factual inaccuracies put forward by the EC. We won't repeat those explanations here, except to note that where the parties are in agreement as to the facts, the Panel should not engage in speculation regarding alternative factual scenarios that do not in fact exist. The parties agree that Section 110(5)(A) does not apply to nondramatic musical works. The parties agree that the square footage limitations of Section 110(5)(B) do not apply to Section 110(5)(A). This is the plain language of the statutes; no U.S. court has ruled otherwise, and these are the only facts before the Panel.

by concordant pronouncements that establish a pattern implying the agreement of the parties regarding a treaty's interpretation.[1]

6. Like TRIPS, the WCT is an agreement explicitly designed to provide a higher level of protection than Berne. It says explicitly that it is a "Special Agreement" within the meaning of Berne Article 20, that it does not derogate from existing obligations under Berne, and it specifically requires compliance with Articles 1-21 and the Appendix of the Berne Convention.

7. Article 10(2) of the WCT specifically states that "when applying the Berne Convention" Contracting Parties shall confine limitations to those that meet the same test set out in TRIPS Article 13. The preparatory materials of the WCT are also enlightening, as the Basic Proposal for the '96 Diplomatic Conference specifically discusses the application of the 3-step TRIPS test to minor reservations under Berne.

8. The U.S. view that Article 13 provides the standard governing all exceptions or limitations to exclusive rights is consistent with the context of Article 13, including TRIPS Article 2.2. It does not imply that TRIPS reduced the level of protection below the level permissible under Berne. The Berne Convention permits minor exceptions to exclusive rights.

9. As described at some length in the U.S. Answers to the Panel's Questions and the U.S. rebuttal submission, the subsequent practice of Berne members indicates widespread acceptance of the notion that exceptions to Article 11 and 11*bis* rights are permissible. Furthermore, the negotiating history of Berne, in particular from the Brussels and Stockholm conferences, confirms that Berne members intended that exceptions be allowed to the exclusive rights provided in Articles 11 and 11*bis*.

10. Commercial uses are not excluded *per se* from the scope of the minor reservations doctrine. The uses discussed in the General Reports may themselves be commercial in certain circumstances. The specific examples of minor reservations given were never intended to be an exhaustive list. To quote Ricketson: "The examples of uses given in the records of the Brussels and Stockholm Conferences are in no way an exhaustive list or determinative or which particular exceptions will be justified." (p. 536) The discussion of the minor reservations doctrine in the General Reports actually precludes the notion that the doctrine was limited to the exceptions specifically cited. The General Reports only list several traditional exceptions to the public performance right of Article 11. However, the Reports also make certain to note that the minor reservation doctrine is <u>also</u> applicable to Article 11*bis*, 13 and 14. It must have been intended that the doctrine apply to exceptions not specifically listed in the Reports, otherwise that language would have no meaning.

11. Nor is the applicability of the minor reservations doctrine frozen in 1967. Again, the WCT provides useful guidance on this issue. The Agreed Statement concerning Article 10 of the WCT states that Contracting Parties can "carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws" that have been considered acceptable under Berne. We note that the EC was a signatory of both the WCT and the Agreed Statement.

12. Construing the minor reservation doctrine to apply only to exceptions in existence in 1967 also creates inequitable results, and renders Berne less relevant to the modern world. Many developing countries that are now members of Berne had no copyright law, or only a rudimentary one, in 1967. If the EC's argument is accepted, then most developing countries will not be allowed to have any exceptions. In addition, the flexibility of the principles of copyright protection represented in Berne would be drastically undermined were they not allowed to respond to changes and developments in technology as well as practice.

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[1] Japan - Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body, 4 Oct. 1996, at p. 25.

13. For the sake of completeness, I'll now briefly address Article 11*bis*(2). This is a compulsory licensing provision. Compulsory licenses are characterized by the requirement of equitable remuneration. It is not a wholly separate standard governing exceptions. It does not apply in lieu of TRIPS Article 13 and it doesn't affect the applicability of TRIPS Article 13 to this case. Article 11*bis*(2) can, and should, be read consistently with TRIPS Article 13.

14. Article 11*bis*(2) applies to "conditions" on 11*bis* rights. Ricketson writes that "the reference to 'conditions' in article 11*bis*(2) is usually taken to refer to the imposition of compulsory licenses". (p.525). The WIPO Guide to the Berne Convention (p. 70), the WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights (pp. 50, 248), and even the title of 11*bis*(2) assigned by 0 -17.,847332.25 -12.7

14. Article 11*bis*

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national priorities, and a Panel should be loathe to imply them. In this case, both U.S. exceptions rest upon sound public policy objectives related to the social benefits of fostering small businesses and preventing abusive tactics by the collecting societies.

C. NEITHER SECTION 110(5)(A) OR (B) CONFLICTS WITH NORMAL EXPLOITATION

21.

39. On the retail side, the EC has presented a study commissioned by ASCAP purporting to demonstrate that about 45% of retail stores meet the square footage limits of the statute. The EC also alleges that there are 683,783 retail establishments in the United States. 45% of 684 thousand is about 307 thousand.

40. So, even using EC figures for the sake of today's analysis, we have about 239 thousand exempt restaurants and 307 thousand exempt retail stores. That's a total of 546 thousand exempt establishments, which is 52.1% of all establishments. In line 4, we've reduced the possible losses to EC right holders to 52.1%, which is about 294 – 586 thousand dollars.

41. If you follow the same four-step analysis for BMI, the result is a paltry 122 thousand dollars.

6. The U.S. Methodology is Conservative

42. As explained in the U.S. submission, these calculations are conservative and – if anything – overstate the true amount of economic prejudice to EC right holders. Some of the reasons these figures are conservative include:

- The United States has assumed that where 30.5% of establishments play the radio, 30.5% of licensing revenue is attributable to radio-playing. This figure is obviously too high, given the large proportion of establishments that play music from more than one type of media.

- Similarly, the United States assumed that the 65.5% of restaurants (and 45% of retail establishments) that fit within the square footage limits of the exception accounted for a 65.5% (and 45%) loss of revenue. In fact, the exempt restaurants and retail establishments are necessarily smaller establishments, and almost certainly represent a smaller proportion of licensing revenue.

- The analysis also does not take into account steps that ASCAP and BMI might take to minimize any impact of Section 110(5).

- Similarly, the analysis does not take into account the establishments that could take

45. Furthermore, the United States requests that the Panel clearly delineate its findings regarding sub-section (A) and sub-section(B) of Section 110(5), in order to provide maximum guidance to WTO members regarding the interpretation of the TRIPS provisions at issue.

ATTACHMENT 2.7

COMMENTS ON THE LETTER FROM THE DIRECTOR GENERAL OF WIPO TO THE CHAIR OF THE PANEL

(12 January 2000)

1. The United States appreciates this opportunity to comment on the material provided to the Panel by the International Bureau of the World Intellectual Property Organization (WIPO). The United States further appreciates the Panel's communication of January 10, 2000, regarding the deadline for submitting comments on these materials.

2. In the view of the United States, the extensive material provided by WIPO does not raise issues not already addressed by the Parties and discussed in the two Panel meetings in this case. The material further confirms the importance that Berne negotiators attached to the permissibility of exceptions under Articles 11 and 11*bis*, and the existence of the minor reservations doctrine. *See, e.g.*, Annexes X, XII and XIII. For this reason, the United States considers that these documents support the U.S. position in this case.

3.1 AUSTRALIA

3.1.1 WRITTEN SUBMISSION OF AUSTRALIA

(1 November 1999)

SYNOPSIS

- Exceptions or limitations to the right of authorising public communication of broadcast copyright works under the TRIPS Agreement must conform with:

  - the general conditions set by TRIPS Article 13, and

  - the specific conditions set by Article 11*bis* of the Berne Convention as incorporated in TRIPS,

  consistent with the general objectives and principles of TRIPS, in particular Article 7.

- It would be valuable to clarify the relationship between TRIPS and Berne as they apply to this specific right:

  - there is no hierarchy of authority between TRIPS Article 13 and Berne Article 11*bis*(2), but the latter provision provides more direct guidance as to the present case;

  - any exception or limitation would still need to conform with each of the two as to

set, that is a specific instance of the general balance of interests that is required in TRIPS Article 7 and also expressed in Article 13;

- Article 9(2) of Berne, by contrast, has only limited and indirect relevance to the determination of the scope of allowable exceptions and limitations to this right.

- Equitable remuneration in relation to the right of public communication of broadcast works should entail recognition of any specific commercial benefits that are intended to result from public communication made for commercial objectives:

  - the confinement of this right to an entitlement to equitable remuneration represents a significant constraint on the exercise of the right, allowing exclusion of the right to prohibit public communication and to seek inordinate remuneration, and allowing for it to be implemented through compulsory licensing;

  - equitable remuneration in this context maintains the balance of rights and objectives called for in TRIPS Article 7;

  - it also clarifies the nature of "unreasonable prejudice" in the application of TRIPS Article 13 to the right of public communication of broadcast works.

Table of Contents

I. POLICY BACKGROUND

1.1 Historically, at a national level, copyright and related rights have been developed, enforced, and subject to limitations and exceptions with the overall goal of serving the broader public interest through the provision of effective and appropriate private rights. The WTO Agreement on Trade-Related Aspect of Intellectual Property Rights ("TRIPS") articulates this balance, already present in the established copyright norms of the Berne Convention for the Protection of Literary and Artistic Works ("Berne"),[1]

interests under consideration being the potential use of the new medium of broadcasting for the dissemination of cultural works.

1.6 Australia's involvement as a third party in this case reflects:

- an immediate trade interest in ensuring that Australian composers and songwriters can obtain equitable remuneration in relation to the public communication of broadcasts of their musical works in the important US market;[5] and

- the need to preserve the integrity of the rules relating to trade-related IPRs: that is, ensuring that TRIPS (and, in this case, specifically the Berne provisions it incorporates) is interpreted and applied in national law in a manner that ensures that the common standards are fully respected, while maintaining a legitimate scope for public policy exceptions to IPRs, in a way that preserves the balance of interests enshrined in TRIPS and promotes its objectives.

Australia's approach is accordingly governed by the concern that there should be no unreasonable

The scope and objective of Berne Article 11*bis*: the right of public communication of broadcast works, and conditions on that right

2.2 S.110(5) provides that certain forms of public communication of broadcast works shall not infringe copyright. This creates a clear exception to the right established in accordance with Berne 11*bis*(1) which provides to authors of literary and artistic works (including musical works) the exclusive right of authorizing *inter alia* "the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work".[7] This is subject to the provision (Article 11*bis*(2)) that it "shall be a matter for legislation in the countries of the [Berne] Union to determine the conditions under which [this right] may be exercised… [These conditions] shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by

TRIPS 2.2 provides that TRIPS does not derogate from existing obligations under Berne: this suggests that any rights or exceptions permitted under TRIPS should be consistent with Berne in its own right. TRIPS was negotiated with a background understanding of the scope of the provisions of Berne, and, while there is not necessarily a direct linkage with the interpretative history of Berne, it is unquestionable that the Berne negotiations form part of customary international law in this area. Moreover, the inclusion of Berne provisions in TRIPS indicates that the object and purpose of TRIPS extend to the promotion of the full and effective implementation of those provisions.

2.7 It is submitted that both the interpretative history of Berne and the specific objectives of TRIPS are relevant to the application of overlapping TRIPS and Berne provisions, in the absence of any contradiction between the two. There are in fact certain instances where the background of Berne helps elucidate the way interests are balanced in TRIPS. In dealing with the complex issues at stake in this case, it would be useful to articulate more clearly how this linkage should operate.

Berne Article 11*bis*(2) and TRIPS Article 13: reconciling the general and specific provisions

2.8 There are compelling policy and legal reasons to maintain consistency between Berne 11*bis* and TRIPS 13 when they are applied to the same right. This question has not been explicitly raised by either party, but is implicit in the interpretations made in their submissions. There is a need for clarity and consistency of application, particularly given that overlapping Berne and TRIPS provisions have not before been considered in a WTO DSU context.

2.9 The first question relates to their respective scope - does TRIPS 13 encompass Berne 11*bis*(2), or are they co-extensive in relation to broadcast works? A WIPO commentary on the relationship between TRIPS 13 and exceptions and limitations in Berne remarks that:

> None of the limitations and exceptions permitted by the Berne Convention should, if correctly applied, conflict with the normal exploitation of the work and none of them should, if correctly applied, prejudice unreasonably the legitimate interests of the right holder. Thus, generally and normally, there is no conflict between the Berne Convention and TRIPS Agreement as far as exceptions and limitations to the exclusive rights are concerned.[8]

2.10 This suggests that no fundamental conflict need exist, and that all(provisions have not before been considered

2.12 Further, TRIPS 13, as a general provision, cannot override the more specific Berne 11*bis*(2): it is more likely that the latter provision indicates how the parties considered the general principle would apply in these circumstances, and there is no evidence to suggest that the general was intended to override the specific in this particular case; hence the specific provision should prevail in the event of any unclarity. This legal principle - *generalia specialibus non derogant* – is well established in common law and can be drawn on in the international context.[11] Further, TRIPS 13 provides that limitations and exceptions are to be *confined* in a certain way: this does not rule out further, more focussed constraints, based on specific Berne provisions. Since the two provisions are equally binding on WTO Members, and can be interpreted without conflict between them, an exception or limitation to the right of public performance of broadcast works should comply with both TRIPS 13 and Berne 11*bis*(2).

2.13 The incorporation of Berne 11*bis* establishes this right under TRIPS; it would follow that any provision allowing limitations to that right (such as 11*bis*(2)) would also be significant in determining related TRIPS obligations. The General Report of the Brussels Conference states that Berne 11*bis*(1), "with its three separate items, is inseparable from paragraph 2".[12]

2.14 It is submitted that the preferable approach would be to acknowledge that Berne 11*bis*(2) influences the application of TRIPS 13 to rights established under Berne 11*bis* (but not its application to other rights). This would promote consistency of interpretation between the key provisions of TRIPS and of Berne incorporated within TRIPS. Berne 11*bis*(2) provides the clearest, most authoritative guidance as to how acceptable limitations and exceptions under TRIPS 13 apply to the right of public communication of broadcast works; at the same time, it establishes a direct test for TRIPS-consistency of any exception or limitation on that right.

III. ANALYSIS OF BERNE ARTICLE 11*BIS*

Scope of the specific limitations in Berne Article 11*bis*: interpretative background

3.1 The right of public communication of broadcast works was incorporated into the Berne Convention at the Brussels Conference (1948) with no significant opposition,[13] confirming that a distinct right existed over and above the broadcast right itself.

> The rationale for this is that the author thinks of his licence to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting.[14]

3.2 The Brussels Conference considered the limitations that national legislation may place on this right, leading to the adoption of Article 11*bis*(2). Three delegations had made drafting proposals (bw (13whn be

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The last sentence underscores the *de minimis*

contexts which are clearly and substantially commercial in nature, and when commercial benefits arise from use of the music, often as a conscious commercial judgement (such as the contexts noted by the NBLA, 3.9 above). For example, broadcast musical works are communicated to members of the public for their entertainment and for commercial gain, such as through increased patronage (even if no direct or distinct charge is levied for the communication of the broadcast as such), as an alternative to commercial music services or licenses for other forms of commercially-motivated public communication of works.

3.12 It would be consistent with the notion of "equitable remuneration" for the revenue to be scaled, within practical bounds, according to the overall commercial interests engaged. As discussed in para 3.6, equitable remuneration may even be determined to be nil for certain public-interest or *de minimis* public communications (such as those cited at the Brussels Conference). The matter is less clear in relation to incidental use of broadcast works, and in particular in the context of so-called "homestyle" reception of broadcasts on the premises of small businesses, especially when the public communication is incidental or unintended, and is not specifically directed at clientele in the course of pursuing commercial activities. In certain such limited contexts, "equitable remuneration" may also be effectively nil.[28] Nonetheless, the situation is clearer for significant and unambiguous commercial use of the copyright work. It would be difficult to maintain that, in the present case, the effective elimination of the public communication of broadcast right in a wide range of commercial settings amounts to a determination by the authorities, in the absence of agreement, that nil remuneration is the most equitable outcome in all those commercial settings. There was no consent to the removal of the public communication right or the entitlement to obtain equitable remuneration on the part of the right holders' representatives in the present case:

> ASCAP is totally committed to overturning the "Music Licensing Amendment" which allows for-profit restaurants, bars, grills and retailers to avoid paying for music performed over radio and television speakers. Very simply, it is not fair that any of us should be forced to work for free.[29]

3.13 The right in question is "to obtain" remuneration, and does not entail an obligation on the part of the user to pay remuneration when it is not as a matter of fact sought in any way (including through collective mechanisms) by the right holder. The first submission of the US points to situations in which right holders, or the collecting societies representing them, elect not, for practical or other reasons, to pursue their entitlement to equitable remuneration; but that should be distinguished from an outright abrogation of that right through legislation. The practical possibilities for collecting revenues, and the consequent degree to which right holders may choose to seek remuneration, are contingent matters which may change in the light of technological and commercial developments. The fact that it may be inconvenient to exercise a right in a particular commercial context does not in itself justify the removal of that right. Such exceptions need to be justified on public policy grounds in line with established principles.

3.14 In addition, there is a question as to how national treatment is observed in the situation where the right to obtain remuneration is denied in a foreign market, especially given the voluntary nature of collecting societies as a means of exercising the right of public communication of broadcast works.

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[28] For instance, the Australian collecting society APRA has agreed to issue complimentary licenses in relation to small businesses when broadcasts are received on standard receivers and are not intended to be heard by the public.

[29] Marilyn Bergman, ASCAP President and Chairman of the Board, http://www.ascap.com/meeting99/audiobackup.html.

The nature of public communication

3.15 Article 11*bis* provides no further ion of the na "public communication": it is matter that is still determined according onal legislatio dicial interpretation. Some the "minor reservations" cited at the Br Conference in t ext of 11*bis* (especially t relating to use in the family or domes le) may in fact bearing on the way "p communication" is defined. This ma apparently not a (paragraph 17 of t submission), but Annex B of this submi ts out some backg onsiderations on th should it be considered by the Panel.

IV. TRIPS ARTICLE 13 AND TH LIC COMMUNICA OF BROAD

4.1 TRIPS 13 applies in general to l ns and exceptions to rig r Sectio Part II of TRIPS, and accordingly provides a tes e TRIPS consistency of li ns and ions to the right of public performance of broa orks. When TRIPS 13 w ted, ms used closely followed Berne 9(2). Because o xtual linkage, the two provis e ompared, and, on the face of it, the test establishe IPS 13 does not appear to di y from the three-step test contained in Berne 9(2).[3] instance, the first submission S draws on material relating to Berne Article

> prejudice the legitimate interests of the author, provided that , according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.[31]

In relation to the first criterion of a "special case" in the three-step test, Ricketson notes:

> The words 'in certain special cases' embody a general criterion, and this can be seen as possessing two distinct aspects. First, the use in question must be for a quite specific purpose: a broad kind of exemption would not be justified. Secondly, there must be something special about this purpose, 'special' here meaning that it is justified by some clear reason of public policy or some other exceptional circumstance.[32]

4.5 The second and third criteria were placed in that order to aid in the application of the rule. In

large number of copies and handed them out, for this might seriously cut in on its sales.

Berne Article 11*bis*(2) as a guide to the application of TRIPS Article 13

4.8 As discussed above (2.14, 4.3), Berne 11*bis*(2) has more direct bearing on how TRIPS 13 should be applied in the present case. It stipulates that "conditions" applying to the public communication of broadcast works "shall not be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority". This sheds light on how "normal exploitation", "unreasonable prejudice" and "legitimate interests" should be interpreted in relation to this particular right. For instance, it suggests that compulsory licenses may be consistent with normal exploitation. It lays emphasis on the author's moral rights and right to obtain equitable remuneration as legitimate interests in this context, and it implies that "unreasonable prejudice" would occur if those interests were impaired through the legislative application of any condition on the exercise of an Article 11*bis*(1) right.

TRIPS Article 13 in relation to the objectives of TRIPS

4.9 Ultimately, the interpretation of TRIPS Article 13 must be consistent with the objectives of TRIPS itself, as the first submission of the US notes (para 22). The key provisions in this context are Article 7 ("Objectives") and Article 8 ("Principles"); elements of the preamble may also be relevant. Article 7 focusses particularly on technological innovation, the transfer and dissemination of technology, and the interests of producers and users of technological knowledge, which are not directly at issue in this case. It also points to the need for protection and enforcement of intellectual property rights to be "conducive to social and economic welfare, and to a balance of rights and obligations". Concerns were expressed at the Rome Conference that the development of the then new technology of radiodiffusion as a means of promoting social and cultural welfare should not be impaired by a restrictive application of the new broadcasting right.

4.10 While not in the foreground of the TRIPS negotiations, the history of Berne suggests that the specific balance of interests involved in relation to the public performance of broadcast works appears to be between the right of the author to remuneration,[36] and the need for broadcasting media to develop and contribute to social and economic well-being. What factors should be considered in maintaining this balance? Clearly, it was not intended to give the author the right to prohibit the public communication of the broadcast of the work, as this would be an unreasonable constraint on the use of broadcast material. Some *de minimis* or public interest exceptions to the right were also entertained in relation to some jurisdictions at least – use within the family or domestic circle, in religious or educational contexts. The author, also, did not have an unlimited right to obtain remuneration – in effect, the author was not given monopoly bargaining power, and it was acknowledged that an independent authority may establish the level of remuneration that would be equitable.

4.11 Hence the balance struck was for an undiminished right of equitable remuneration in relation to use of works that did not fall within the "minor exception" or *de minimis* category. When, at the Rome Conference, Article 11*bis* was introduced in its initial form, the Sub-Committee on Broadcasting reported that the Article was intended "to bring the author's rights into harmony with the general public interests of the State, the only ones to which specific interests are subordinate,'[37] while it 'emphatically confirms the author's right".

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[36] As well as the author's moral rights, if they are not excluded in this context - however, the reference to moral rights in Berne 11*bis*(2) is likely caught by the exclusion of "rights derived" from Berne Article 6*bis* in TRIPS Article 9(2).

[37] *Proceedings of the Conference Convened at Rome*, BIRPI, Berne, 1929, p.183.

4.12 It is submitted that this approach is wholly consistent with the broader objectives of the TRIPS agreement, and is in fact an exemplary application of the "balance" required by Article 7.

V. S.110(5) OF THE US COPYRIGHT ACT IN RELATION TO TRIPS

Conflict with a normal exploitation of the work

5.6 S. 110(5) allows food service, drinking and other establishments to communicate broadcasts of musical work to the public in the direct pursuit of commercial gain. Broadcasts of musical work are often used by such establishments to attract, entertain and create an ambience for patrons. The right to equitable remuneration from the public communication of broadcasts in such commercial settings is a normal exploitation of musical work, distinct form other forms of exploitation. It is possible that right holders may, for practical reasons, elect not to seek such remuneration in certain commercial circumstances, but it is consistent with normal exploitation for them to have that choice, provided the principle of equitable remuneration is not denied. The US submission (para. 34) suggests that licensing fees for the establishments excluded under s.110(5)(A) "would likely be the lowest in the range"; this is arguably more consistent with equitable remuneration in the context of normal exploitation than there being no right to obtain fees at all. "Equitable remuneration" may be at an appropriately low level, but should also recognise the direct commercial gain made from public communication of broadcast works when this is applicable.

5.7 S.110(5) only conflicts with the rightholder's right to authorise the public communication of a broadcast of musical work and derive equitable remuneration from public communications, and does not interfere with the rightholder's other exclusive rights such as the right to reproduce, publish, broadcast or make an adaptation of the work. In this regard s.110(5) could be said to interfere only in a limited way with the rightholder's overall ability to exploit the work. However, Article 13(2) refers to conflict with a (in the sense of 'any') normal exploitation of the work – rather than to conflict with the overall commercialisation of the work. The right of public communication of a broadcast work has been explicitly recognised in the Berne Convention as a distinct right, giving rise to a distinct right of remuneration which forms one of the normal exploitations of the work.

Unreasonable prejudice to the legitimate interest

5.8 We have suggested that in this context, Berne 11*bis*(2) clearly sets out considerations that apply to determination of unreasonable prejudice to the legitimate interests of right holders. A compulsory licensing system, a denial of monopolistic bargaining power, a *de minimis* or public interest educational exception are all forms of prejudice to legitimate interests that would be reasonable: Berne 11*bis*(2) suggests that denial of the right of *equitable* remuneration and of moral rights would be unreasonable.

5.9 It may be argued that any prejudice to rightholders is only minimal because they would

provides an absolute exemption for copyright infringement in a wide range of commercial contexts, it rules out any possibility for obtaining the equitable remuneration consistent with reasonable prejudice to their interests.

ANNEX A

"Don't stop the music!"
A report of the inquiry into copyright, music and small business

In June 1998 the Australian House of Representatives Standing Committee on Legal and Constitutional Matters tabled a report on the public performance and broadcast rights in relation to small business. This report was titled "Don't Stop the Music". The Committee's role was to inquire into and report on the collection of copyright royalties for licensing the playing of music in public by small business. Apart from considering the role played by copyright collection societies, the Committee considered the desirability of amending the Australian Copyright Act in relation to public performance and broadcast rights in a small business context. The Committee made a number of recommendations the following of which are of relevance to the matters before this Panel.

The Committee considered a number of submissions on the royalty scheme for the use of background music. The Committee noted that many small businesses felt that they should be exempt from having to pay a fee for the playing of music in their business. While the Committee was sympathetic to some of their arguments, the Committee did not consider that small businesses should be exempt from paying copyright royalty fee for the public performance of music.

The Committee noted that in some circumstances the use of music in a small business was only intended to be heard by one member of staff and there was a strong case in favour of exempting such businesses from paying licence fees. In this regard, the Committee recommended that the relevant collecting society consider granting a complimentary licence when:

- the means of performance is by the use of a radio or television set; and

- the business employs fewer than 20 people; and

- the music is not intended to be heard by customers or the business or by the general public. That is, neither the radio or television set nor any speakers are located in an area that is accessible to customers or the general public and any performance inadvertently heard by customers or the general public is manifestly unintentional.

However, the Committee found that for most small businesses, music is used to attract, entertain and create ambience for customers. Creating a blanket exemption for small businesses would mean that those businesses using music in a manifestly commercial manner would be exempt from paying licence fees. The Committee considered that this would not be an inequitable outcome and recommended against this course of action.

ANNEX B

Definition of "in public"

The rights contained in article 11*bis*(1)(iii) of the Berne Convention refer to the *public* communication of a broadcast of work. The question arises as to whether the circumstances envisaged by s.110(5) would amount to a *public* communication of a broadcast of work.

The Berne Convention does not provide a definition as to what is meant by the term *public* communication. The Brussels Conference (1948) provided some guidance in defining the *public* for broadcasting and communication rights:

> above all, where people meet: in the cinema, in restaurants, in tea rooms, railway carriages....It also appears from the programme that perhaps the most important of these "public places" were those where people worked and conducted their business, such as factories, shops and offices.[39]

On this point the WIPO Guide to the Berne Convention notes:

> In places where people gather (cafes, restaurants, tea-rooms, hotels,

Under existing Australian case law, it is clear that the Australian courts will take into account the following factors in determining whether a performance is in public:

- First, a performance is "public" unless it takes place in a "domestic and private" setting;

- Secondly, where the performance occurs as an adjunct to a commercial activity, it will be in public;

- Thirdly, the audience in question clearly forms part of the copyright owner's public.

- it also clarifies the nature of "unreasonable prejudice" in the application of TRIPS Article 13 to the right of public communication of broadcast works.

3.1.3 RESPONSES OF AUSTRALIA TO WRITTEN QUESTIONS FROM THE PANEL

(19 November 1999)

Australia welcomes the opportunity to provide further background information on this case in response to the Panel's questions. It notes, however, that the copyright law and practice in Australia and in countries other than the US are not at issue in this case, and submits that TRIPS obligations should not be determined by the approach taken in any one national system, practice or tradition.

Q.1

> (3) Where visual images or sounds are displayed or emitted by any receiving apparatus to which they are conveyed by the transmission of electromagnetic signals (whether over paths provided by a material substance or not), the operation of any apparatus by which the signals are transmitted, directly or indirectly, to the receiving apparatus shall be deemed not to constitute performance or to constitute causing visual images to be seen or sounds to be heard but, in so far as the display or emission of the images or sounds constitutes a performance, or causes the images to be seen or the sounds to be heard, the performance, or the causing of the images to be seen or sounds to be heard, as the case may be, shall be deemed to be effected by the operation of the r0eceiving apparatus.
>
> (4) Without prejudice to the last two preceding subsections, where a work or an adaptation of a work is performed or visual images are caused to be seen or sounds to be heard by the operation of any apparatus referred to in the last preceding subsection or of any apparatus for reproducing sounds by the use of a record, being apparatus provided by or with the consent of the occupier of the premises where the apparatus is situated, the occupier of those premises shall, for the purposes of this Act, be deemed to be the person giving the performance or causing the images to be seen or the sounds to be heard, whether he or she is the person operating the apparatus or not.

Section 31 of the same Act provides, in part:

> (1) For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a work, is the exclusive right:
>
> (a) in the case of a literary, dramatic or musical work, to do all or any of the following acts:
>
> (i) to reproduce the work in a material form;
>
> (ii) to publish the work;
>
> (iii) to perform the work in public;
>
> (iv) to broadcast the work;
>
> (v) to cause the work to be transmitted to subscribers 36 0 -h9fg9 Tc dlansmitte(iiimakeork or an a

2(ii) Exercise of the right

The current domestic arrangement in Australia is that the rights in respect of public performance of broadcast musical works are exercised by a collective management organization. The right to authorise public performance of broadcast musical works is in practice exercised by the Australasian Performing Right Association Limited (APRA).[43] In exercising these rights, APRA provides for licenses for broadcast musical works on a scale linked with the extent of the public performance, as determined by the number of TV or radio sets and additional loudspeakers. To authorise musical performances at the premises by radio or TV sets, including TV sets used to show videos, free to air TV, satellite TV broadcasts and cable TV, for background and listening purposes only, the annual license fee for each radio set is $37.62 (and each additional speaker $0.94); and for each television set $37.62 (and each additional speaker $0.94). A distinct license is available to authorise performances of music in the workplace for the benefit of employees, at the annual rate of 56 cents per full-time employee, with a minimum annual fee of $37.62.

APRA issues a complimentary licence in instances where:

(a)

- A café playing a radio in the staff-only food preparation areas. The location of the radio and the volume indicate that, while music may sometimes be overheard by customers, it is not played for their benefit.

- A small hardware store with three employees where a radio is located in the storage/supply area behind the counter for the benefit of employees.

- A laundromat with five staff playing a radio in an open work area behind the counter. There are no additional speakers and the performance is intended for the benefit of employees.

- An owner/operator tailor with a television in the working area behind the counter. Performance is for the benefit of the owner.

- A doctor's surgery. The receptionist plays a radio at low volume. Music is not clearly audible to patients in the waiting room.

Q.3. Please explain which individual exclusive rights under which specific provisions of Articles 11(1) and 11 *bis*(1) of the Berne Convention are affected to what extent by which specific provision of Subsection (A) and/or (B) or Section 110(5).

Section 110(5) creates exceptions to the right of communication to the public of certain broadcast musical works, by providing that certain use made of the works is not infringement of copyright. It is apparently not in contention that this use is communication to the public.

Communication to the public is covered in general terms under Article 11(1) of Berne, and this would, on the face of it, include the forms of communication excepted under Section 110(5). Broadcasting itself could be viewed as a particular form of public communication of a work.

Article 11*bis* was introduced at the 1928 Rome Conference to provide international rules governing the broadcasting of literary and artistic works. It is therefore submitted that this is the more directly relevant provision. The WIPO *Guide to the Berne Convention* (p.65) comments:

> The second leg of this right [Article 11(1)] is the communication to the public of a performance of the work. It covers all public communication except broadcasting which is dealt with in Article 11*bis*. For example, a broadcasting organisation broadcasts a chamber concert. Article 11*bis* applies. But if it or some other body diffuses the music by landline to subscribers, this is a matter for Article 11.

Subsections A and B relate to the public communication of broadcast musical works, so that Article 11*bis* applies to both subsections. In particular, while Subsection A relates to potentially more limited forms of public communication, it was explicitly intended to cover intentional and direct communication to the public, and in particular to allow business proprietors to communicate broadcasts "for their customers' enjoyment"[45]

Q.4. In your view, what is the relationship between Article 13 of the TRIPS Agreement and Article 11*bis*(2) of the Berne Convention?

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[45] Report of the House Committee on the Judiciary, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 87 (1976), cited.

Please see section 2 of the Australian submission, in particular paras 2.11-2.12.

Does Article 13 of the TRIPS Agreement prevail over the exception in Article 11*bis*(2) with respect to the exclusive rights conferred by Article 11*bis*

3.2 BRAZIL

3.2.1 ORAL STATEMENT AT THE THIRD PARTY HEARING

(9 November 1999)

On behalf of the Government of Brazil I thank you for your attention to this matter. Brazil welcomes the opportunity to participate in this Panel as a third party. What motivates Brazil to intervene in this dispute is essentially a systemic interest on the implications to the interpretation on the scope of exceptions contained in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). At the same time, our participation stems from concrete interests, since the portion of the market in the United States for Brazilian music has increased substantially over the last few years. Brazilian composers have complained that the US "Fairness in Music Licensing Act" is hurting their legitimate interests in that market.

As argued by the European Communities / Member States (EC/MS) in its first submission, the exemptions for commercial establishments provided by Section 110(5) of the US Copyright Act are, in Brazil's view, incompatible with multilateral obligations that stem from the TRIPS Agreement, insofar as this Agreement incorporates articles 1 through 21 of the Berne Convention for the Protection for the Literary and Artistic Works (1971).

By means of **Article 9 (1) of TRIPS**, these obligations have become an integral part of WTO rules, being fully subject to the dispute settlement mechanism of the Organization. **Article 11*bis*(1)(iii) of the Berne Convention** states that "*authors of literary and artistic works shall enjoy the exclusive right of authorizing (…) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work*". **Article 11(1)(ii) of the Berne Convention** provides that *"Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing any communication to the public of the performance of their works*". Finally, **Article 11*bis*(2) of the Berne Convention** establishes that "*it shall be a matter of legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceeding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.*"

The United States claims that the point in question here is that Section 110(5) of the US Copyright Act creates a "minor" exception to the exclusive right over public performance. In this context, the US submission attempts to justify that those exceptions would be covered by Article 13 of the TRIPS Agreement on limitations and exceptions to copyrights and related rights. Brazil, however, is of the opinion that **this panel should consider Section 110(5) in light of the most specific provisions, which are those covered by Articles 11*bis*(1)(iii), 11(1)(ii) and 11*bis*(2) of the Berne Convention**. The US submission fails to explain how Section 110 (5) could be compatible with its commitments under those specific provisions.

The submissions by the European Communities and Australia provide some valuable contribution for this panel to understand the conflict between the exceptions to copyrights in the US legislation and the existing provisions under TRIPS and the Berne Convention.

Brazil concurs with the European Communities that the situations covered by Section 110 (5) refer (explicitly, in the case of Subsection (A), or implicitly, in the case of Subsection 7(B)) to "public communication" in the sense of Article 11*bis*(1)(iii) and Article 11(1)(ii) of the Berne Convention. Consequently, by denying protection under those provisions, the US is violating its commitments related to TRIPS Article 9 (1).

Most importantly, Brazil endorses the legal argumentation provided by the Australian submission that Article 11*bis*(2) of the Bern Convention provides more specific guidance to the panel on the application of Section 110(5). Bearing the burden of proof to invoke the exception, the US fails to explains the consistency (if any) between Section 110(5) and that provision.

Section 110(5) is admittedly a circumstance that is prejudicial to the author's right to obtain equitable remuneration. The denial of that right is recognized in paragraph 29 of the US submission.[1] When the US Copyright Act, as amended by the "Fairness in Music Licensing Act", permits the broadcasting of radio and television music in public places without the payment of a royalty fee, it is actually exempting owners from the application of a mandatory rule whose exceptions are not applicable to this case. Article 11*bis*(2) of the Berne Convention, however, defines that "in any circumstances" the conditions to the right of public communication should be prejudicial to the author's right to obtain equitable remuneration. In doing so, the US is violating of a mandatory rule on clear prerogatives of right holders.

As noted in the Australian submission, the scope of the exception provided by Section 110(5) is much larger than envisaged in the negotiating history of the Berne Convention. The Brussels Conference of 1948 emphasized the limitations of the concept of "minor reservations" as exceptional measures. Such reservations, later confirmed by the Stockholm Conference of 1967, aimed at situations such as, for instance, religious ceremonies, performances by military bands and the requirements of education and popularization - mostly characterized by their non-commercial nature. Such is not the case of Section 110(5), where establishments that benefit from the "homestyle exemption" are essentially commercial. The size of the establishment or the number of loudspeakers in a limited area, as defined by Section 110(5), does not characterize the nature of the use of the broadcasted work as non-commercial. To the contrary, such use is admittedly aimed at attracting customers and consequently improving the profits of the owners of the establishment.

The EC also notes that Since Section 110(5) entitles 70% of all drinking and eating establishments and 45% of all retail establishments in the US to play music from the radio and TV for the enjoyment of their customers without any limitation of any kind, it is more than reasonable to argue that the normal exploitation of the works is at risk and that the legitimate interests of the right holders can be prejudiced. In its submission, the US were unable to produce statistics that prove that the impact on right holder's revenues of the "Fairness in Music Licensing Act" is negligible. Brazil considers, however, that even if such statistics were available, the task of examining Section 110 (5) would still be unrelated to quantitative limitations on the size of the area of the establishments or the number of loudspeakers. Brazil considers that the most important task of this panel is to judge the legitimacy of the exception provided by Section 110 (5) in light of its essentially commercial nature.

[1] "Section 110(5) does not affect a copyright owner's right to be compensated for these types of exploitation [i.e., primary performance]. Rather, it affects only secondary uses of broadcasts. Moreover, it does not exempt all secondary performance, but only those in establishments that use homestyle receiving equipment, or meet the square footage and other criteria in the statute".

3.2.2 RESPONSES OF BRAZIL TO WRITTEN QUESTIONS FROM THE PANEL

(17 November 1999)

Q.1 Please give examples of exceptions in the copyright laws of your country or of other countries based on the "minor reservations" doctrine.

In the Brazilian legislation there are a few examples of exceptions in the sense of the "minor reservations" doctrine mentioned in this question. Those are cases where there would be no violation of copyright, such as: (a) the reproduction in the daily or periodical press of news or informative articles, from newspapers or magazines, with a mention of the name of the author, if they are signed, and of the publication from which they have been taken; (b) the reproduction in newspapers or magazines of speeches given at public meetings of any kind; (c) the reproduction of literary, artistic or scientific works for the exclusive use of the visually challenged, provided that the reproduction is done without gainful intent, either in braille or by means of other process using a medium designed for such users; (d) the use of literary, artistic or scientific works, phonograms and radio and television broadcasts in commercial establishments for the sole purpose of demonstration to customers, provided that the said establishments market the materials or equipment that make such use possible.

Q.2 Is the communication to the public contained in broadcasts or played from sound recordings or live subject to exclusive rights or right of remuneration in your legislation, and are the rights in respect of such uses of music exercised by the right holders or by their collective management organizations?

According to the new Brazilian Law on Copyrights and Related Rights (Law 9.610, dated 19 February 1999), authors have the exclusive right to use their literary, artistic and scientific works, to derive benefit from them and to dispose of them. Authors and the owners of related rights may form non-profit-making associations for the exercise and defense of their rights. These associations of authors and of the owners of related rights shall jointly maintain a single central office ("Escritório Nacional de Arrecadação de Direitos - ECAD") for the collection and distribution of the royalties generated by the public performance of musical works with or without words and phonograms, including performance by broadcasting and transmissions by any means and by the presentation of audiovisual works. This central office shall not have any profit-making purpose and shall be directed and managed by the associations of which it is composed.

3.3 CANADA

3.3.1 WRITTEN SUBMISSION

(1 November 1999)

This dispute raises important issues of copyright protection, including the role of limited exceptions. Canada remains highly interested in these issues and looks forward to the outcome of the panel's deliberations.

3.4.2 RESPONSES BY JAPAN TO WRITTEN QUESTIONS FROM THE PANEL

(19 November 1999)

Q.1 Please give examples of exceptions in the copyright laws of your country or of other countries based on the "minor reservations" doctrine.

In general, various conditions are complicatedly combined in provisions for limitations of and exceptions to copyright, and how copyrighted works are used under such provisions considerably differs from nation to nation. This makes it difficult to determine applicability of "minor reservations" doctrine to the related provisions of each domestic law and requires careful consideration thereupon.

Under these circumstances, Japan has so far examined only Subsection A of Section 110(5) of the United States Copyright Act which is under discussion in this Panel, and has no further adequate examples to present.

Q.2 Is the communication to the public of music contained in broadcasts or played from sound recordings or live subject to exclusive rights or right of remuneration in your legislation, and are the rights in respect of such uses of music exercised by the right holders or by their collective management organizations?

In Copyright Law of Japan, such uses of music are subject to exclusive rights, and such rights are exercised either by the right holders or by their collective management organizations. The latter generally exercise such rights as trustees of the former under trust agreements.

3.5 SWITZERLAND

3.5.1 ORAL STATEMENT AT THE THIRD PARTY HEARING

(9 November 1999)

I. INTRODUCTION

1. The complaint brought by the European Communities and their member States against the United States of America is based on the consideration that certain aspects of the US legislation relating to the protection of copyrighted works are incompatible with the WTO Agreement on

Convention. All other TRIPS provisions on Copyright were introduced in the Agreement for purposes of clarification or improving the corresponding provisions of the Berne Convention, not of diminishing the level of protection.

III.

V. CONCLUDING REMARK

10. Switzerland concurs with the position of the European Communities and their member States and supports the pertinent arguments put forward by Australia.

3.5.2 RESPONSES OF SWITZERLAND TO WRITTEN QUESTIONS FROM THE PANEL

(19 November 1999)

Q.1 Please give examples of exceptions in the copyright laws of your country or of other countries based on the "minor reservations" doctrine .

Art. 22 Par. 1 of the Swiss Copyright Law (CRL[1]) provides an exception with regard to cable distribution and to communication to the public of broadcast works. These limitations comply with Art. 11*bis*(2) of the Berne Convention (BC) in the sense that they do not abolish or diminish the right of the author to obtain equitable remuneration for the exploitation of his work.

Q.2 Is the communication to the public of music contained in broadcasts or played from sound recordings or live subject to exclusive rights or right of remuneration in your legislation, and are the rights in respect of such uses of music exercised by the right holders or by their collective management organizations?

According to Art. 22 Par. 1 CRL, the right of communication to the public of broadcast works (all categories of works, not only musical works) is an exclusive right, but it is subject to compulsory collective management by collecting societies. It should be underlined that this legal construction is not a legal licence.

Article 11bis(2) of the Berne Convention prevail as a *lex specialis*

4.1 LETTER FROM THE CHAIR OF THE PANEL TO THE DIRECTOR GENERAL OF WIPO

(15 November 1999)

At its meeting on 26 May 1999, the WTO Dispute Settlement Body established a panel pursuant to the request by the European Communities and its member States (please see the attached document WT/DS160/5), in accordance with Article 6 of the Dispute Settlement Understanding. On 6 August 1999, a Panel was composed to examine this complaint (please see the attached document WT/DS160/6).

The EC complaint relates to Section 110(5) of the United States Copyright Act, as amended by the "Fairness in Music Licensing Act" enacted on 27 October 1998, which exempts, under certain conditions, the communication or transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes (subparagraph A) and, also under certain conditions, communication by an establishment of a transmission or retransmission embodying a performance or display of a non-dramatic musical work intended to be received by the general public (subparagraph B) from obtaining an authorization to do so by the respective right holder. The EC claims that Section 110(5) of the US Copyright Act appears to be inconsistent with the United States' obligations under the TRIPS Agreement, including, but not limited to, Article 9.1 of the TRIPS Agreement.

The Parties to the dispute refer to the provisions of the Paris Act 1971 of the Berne Convention for the Protection of Literary and Artistic Works, the substantive provisions of which (with the exception of Article 6*bis* on moral rights and the rights derived therefrom) have been incorporated into the TRIPS Agreement by Article 9.1. These provisions include, in particular, Articles 11 and 11*bis*, as well as the limitations applicable thereto. Given that the International Bureau of WIPO is responsible for the administration of that Convention, the Panel would appreciate any factual information available to the International Bureau on the provisions of the Berne Convention (1971) relevant to the matter, in particular the negotiating history and subsequent developments and practice concerning those provisions referred to by the Parties to the dispute.

The Parties have also referred to the so-called "minor reservations" doctrine (in particular in relation to Articles 11 and 11*bis*). The Panel would be interested in any factual information relevant to the status of this doctrine within the Berne Convention as reflected in the materials of Diplomatic Conferences as well as any other documentation relating to the Berne Union or work under the auspices of WIPO on copyright matters, as well as the state practice of the Berne Union members in this regard.

Furthermore, the Parties have referred to Article 13 of the TRIPS Agreement, which uses

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4.2 LETTER FROM THE DIRECTOR GENERAL OF WIPO TO THE CHAIR OF THE PANEL

(22 December 1999)

I have the honour to refer to your letter of November 15, 1999, relating to an ongoing dispute which is being dealt with by a panel under the Dispute Settlement Body of the World Trade Organization (WTO).

Please find attached a Note and Annexes, prepared by the International Bureau of the World Intellectual Property Organization (WIPO) in response to your questions. As indicated in paragraphs 18, 20 and 23 of the Note, the International Bureau of WIPO is prepared to furnish additional information, at your request.

NOTE

on Certain Questions Regarding the Berne Convention
raised by the World Trade Organization

1. This Note contains the observations of the International Bureau of the World Intellectual Property Organization (WIPO) in response to a request made by H.E. Mrs. Carmen Luz Guarda, Chair, Panel on United States - Section 110(5) of US Copyright Act, World Trade Organization (WTO), in a letter of November 15, 1999, addressed to Dr. Kamil Idris, Director General of WIPO.

2. The requested information, related to the dispute in the above-mentioned Panel under the WTO Dispute Settlement Body, is the following:

> (1) regarding Articles 11 and 11bis of the Berne Convention, as well as the limitations applicable thereon: "any factual information available to the International Bureau on the provisions of the Berne Convention (1971) relevant to the matter, in particular the negotiating history and subsequent developments and practice concerning those provisions referred to by the Parties to the dispute;"
>
> (2) regarding the so-called "minor reservations" doctrine (in particular in relation to Articles 11 and 11bis): "any factual information relevant to the status of this doctrine within the Berne Convention as reflected in the materials of Diplomatic Conferences as well as any other documentation relating to the Berne Union members in this regard;"
>
> (3) regarding Article 9(2) of the Berne Convention, given the similarity of the language used in that provision and in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement): "any background information on the negotiation history of Article 9(2) and subsequent developments and practice concerning the provision."

Question 1: Articles 11 and 11*bis* and the limitations applicable thereon

3. The origin of Article 11 of the Berne Convention (1971) is, as regards non-dramatic musical works, Article 9(3) of the Berne Convention (1886) which granted national treatment to authors of such unpublished works—and published works if a prohibition of performance was indicated on the title page. The Draft Convention, adopted at a conference organized by the International Literary Association in Berne in 1883, contained the following provision:

> "Article 5: Authors who are nationals of one of the Contracting States shall, in all the other States of the Union, enjoy the exclusive right of translation throughout the duration of the rights in their original works.

"That right shall include the rights of publication or performance."[1,2]

4. The Program proposed by the Swiss Federal Council for the International Conference for the Protection of Authors' Rights which was held from September 8 to 19, 1884, in Berne, contained in its Article 7 an identical provision, apart from an added alternative proposal regarding the right of translation.[3] Discussions of that proposal have been identified in the minutes of the Third Meeting of the Conference, where the Conference discussed a questionnaire of the German Delegation. An excerpt is attached to this Note as Annex I.[4] The Records of the Conference do not contain minutes

(2) wishes (vœux) expressed by various congresses and meetings since the adoption of the 1896 Act of the Convention;[22]

(3) excerpts of the Minutes of the Conference regarding a presentation of the proposal of the Government of Germany, made by Professor, Dr. Osterrieth;[23]

(4) excerpts of the Minutes of the Conference regarding an oral proposal by the Delegation of Switzerland;[24]

(5) excerpts of the Minutes of the Conference containing an observation by the Delegation of Great Britain in connection with the adoption of Article 11, as proposed by the Commission.[25]

11. The 1914 Additional Protocol to the Convention was signed in Berne without a conference of revision. It did not amend Article 11 of the Convention.

12. The Rome Act of the Convention, adopted at a Diplomatic Conference from May 7 to June 2, 1928, did not amend Article 11, but it added Article 11*bis*, dealing with the right of broadcasting, which had the following wording:

> "(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the communication of their works to the public by radio-diffusion.
>
> "(2) The legislations of the countries of the Union shall determine the conditions under which the right mentioned in the preceding paragraph may be exercised, but the effect of those conditions shall apply only in the countries where they have been prescribed. This shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain an equitable remuneration which, in the absence of agreement, shall be fixed by the competent authority."

13. Annex X to this Note contains the Report of the Sub-committee on Broadcasting[26] and excerpts of the General Report of the Drafting Committee (Rapporteur Mr. Edoardo Piola Caselli) relating to Article 11*bis*[27]. Annex XI to this Note contains the following excerpts from the Records of the Conference relevant to Article 11*bis* of the 1928 Rome Act of the Convention:

(1) excerpts from the Program of the Conference, containing the proposal of the Government of Italy and the International Bureau, regarding Articles 11 (for which no amendment was proposed) and 11*bis*;[28]

(2) observations of the Government of Germany;[29]

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[22] Source: Actes 1908, pp. 88f.
[23] Source: Actes 1908, pp. 162 and 167.
[24] Source: Actes 1908, p. 180.
[25] Source: Actes 1908, p. 216.
[26] Source: Berne Centenary, p. 165.
[27] Source: Berne Centenary, pp. 173f.
[28] Source: Actes de la conférence réunie à Rome du 7 mai au 2 juin 1928 (in the following referred to as "Actes 1928"), pp. 75 and 76f.
[29] Source: Actes 1928, p. 88.

(3) proposed Article 11*bis* of the Government of Austria;[30]

> organization other than the original one; (iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.
>
> "(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."

15. Annex XII to this Note contains:

(1) excerpts from the General Report on the Work of the Brussels Diplomatic Conference for the Revision of the Berne Convention, presented by Mr. Marcel Plaisant, Rapporteur-General, relating to Articles 11 and 11*bis*, and discussing in this connection also the so-called "minor reserves";[39]

(2) Report by the Sub-Committee on Broadcasting and Mechanical Instruments;[40]

(3) Report by the Sub-Committee on Articles 11 and 11*ter*.[41]

Annex XIII to this Note contains the following excerpts from the Records of the Conference relevant to Articles 11 and 11*bis* of the 1948 Brussels Act of the Convention, including the discussions regarding the so-called "minor reserves":

(1) excerpts from the Minutes of the Conference containing statements made at the adoption of Articles 11 and 11*bis*;[42]

(2) excerpts from the Records of the Conference, containing, under A, the proposals of the Government of Belgium and the Berne Bureau, under B, proposals, counter-proposals and observations made by Governments of countries, member of the Berne Union, and, under C, summary of the discussions and the outcome of the Conference, relating to Articles 11, including the so-called "minor reserves," and Article 11*bis* of the Convention;[43]

(3) wishes (vœux) expressed by various congresses and meetings between 1927 and 1935, relating to the right of public performance and the right of broadcasting;[44]

(4) wishes expressed by various congresses and meetings between 1936 and 1948;[45]

(5) Memorandum of "l'Organisation internationale de radiodiffusion".[46]

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[39] Source: Berne Centenary, p. 181.
[40] Source: Berne Centenary, pp. 185ff.
[41] Source: Berne Centenary, p. 191.
[42] Source: Documents de la conférence réunie à Bruxelles du 5 au 26 juin 1948 (in the following referred to as "Documents 1948"), p. 82.
[43] Source: Documents 1948, pp. 252 to 304.
[44] Source: Documents 1948, pp. 448 to 454.
[45] Source: Documents 1948, pp. 492f.
[46] Source: Documents 1948, pp. 522 to 527.

16. The Stockholm Act of the Convention, adopted at the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967, adopted Articles 11 and 11*bis* in the same wording as that which appears in the Paris Act (1971). Annex XIV to this Note contains the following excerpts from the Records of that Conference (references relating solely to Article 11*bis*(3) have been omitted):

(1) excerpts from Proposals for Revision of the Substantive Copyright Provisions (Articles 1 to 20), Proposal by the Government of Sweden with the Assistance of BIRPI (the Basic Proposal), relating to Articles 11 and 11*bis*;[47]

(2) comments from the Government of the Federal Republic of Germany concerning Article 11 of the Basic Proposal;[48]

(3) comments from the Government of Israel concerning Article 11 and 11*bis* of the Basic Proposal;[49]

(4) comments from the Government of Portugal concerning Article 11 of the Basic Proposal;[50]

(5) comments from the Government of the United Kingdom concerning Article 11*bis* of the Basic Proposal;[51]

(6) comments from the Government of Switzerland concerning Article 11*ter* of the Basic Proposal, containing a reference to Article 11;[52]

(7) excerpts of summary of observations of governments, prepared by the BIRPI Bureau, as regards Articles 11 and 11*bis*;[53]

(8) proposal from the Government of Greece concerning Article 11(1);[54]

(9) comments from the Government of India concerning Article 11*bis* of the Basic Proposal;[55]

(10) proposal regarding the regime of cinematographic works, submitted by the Working Group of Main Committee I to Main Committee I;[56]

(11) proposals from the Government of Brazil concerning Article 11*bis* of the Basic Proposal;[57]

(12) proposals from the Secretariat to the Drafting Committee, concerning Articles 11 and 11*bis*;[58]

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(13) Report of the Drafting Committee to Main Committee I;[59]

(14) Additional Report of the Drafting Committee to Main Committee I;[60]

(15) Draft Report of the Rapporteur of Main Committee II to the Committee with addendum, revision and a correction of the revision, relating to preferential rules for developing countries, and Draft Report (final version);[61]

(16) excerpts from the Report of the Work of Main Committee I (Rapporteur Svante Bergström) relating to Articles 11 and 11*bis*, including the general Introduction,[62] and excerpts from the Records showing the corrections made in the Draft Report of the Committee;[63]

(17) excerpts of the Summary Minutes of Main Committee I;[64]

(18) excerpts of the Summary Minutes of the Plenary of the Berne Union.[65]

17. The Diplomatic Conference for the Revision of the Berne Convention which took place in Paris from July 5 to 24, 1971, did not amend the Articles discussed above, and the Records of that Conference have therefore not been analyzed for this Note. Such an analysis can be provided if requested.

18. The request made by H.E. Mrs. Carmen Luz Guarda regarding Articles 11 and 11*bis* of the Berne Convention, as well as the limitations applicable thereon, concerns also other "factual information available to the International Bureau," and "subsequent developments and practice concerning those provisions referred to by the Parties to the dispute." This request covers a vast amount of material which is not available in a systematic and detailed indexed form. Any selection of material considered relevant for the dispute will invariably imply risks of interpretations of the material which would be incompatible with the neutral status of WIPO in relation to the dispute. In order to fulfill the request neutrally, it would be necessary to carry through a complete review of major parts of the copyright and related rights activities of WIPO during the period of so-called

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[59] Source: Records 1967, p. 726.
[60] Source: Records 1967, p. 735.
[61] Source: Records 1967, pp. 735 to 739 and 760 to 762.
[62] Source: Records 1967, pp. 1131 to 1134, 1146, 1165 to 1168 and 1181f.
[63] Source: Records 1967, pp. 739, 740, 742f and 744.
[64] Source: Records 1967, pp. 851f (in the context of discussions regarding the right of reproduction, reference to Article 11*bis*(2) is made in paragraph 653.2), 856 (in the context of discussions regarding the right of reproduction, reference to Article 11 is made in paragraph 711.4), 865f (in the context of discussions regarding cinematographic works), 883 to 885 (in the context of discussions regarding the right of reproduction, reference to Article 11(3) is made in paragraph 1069.1 and to Article 11*bis* in paragraph 1063.1), 893, 902, 902 to 904, 904 to 905 (in the context of discussions regarding the right of public recitation, reference to Article 11 is made in paragraphs 1323.3, 1332, 1335 and 1336), 916 to 917 (in the context of discussions regarding reproduction of lectures, addresses and similar works, references to Article 11*bis* are made in paragraphs 1498.2, 1499.3 to 1500 and 1501.2), 921f (in the context of discussions on exceptions to translation rights, references to Article 11*bis* are made in paragraphs 1565.3 to 1567.3), 923 to 924 (in the context of discussions regarding the principle of equivalent protection in regard to the right of translation, reference to Article 11 is made in paragraph 1607), 926f (in the context of discussions regarding exceptions to the exclusive right of translation, references to Article 11*bis* is made in paragraphs 1652.1 to 1652.2, 1653.2 and 1658.1 to 1658.2), 928, 930 (in the context of the adoption of the Report of the Work of Main Committee I, reference to Article 11 is made in paragraph 1749), 936f (in the context of the adoption of the adoption of the Report of Main Committee I).
[65] Source: Records 1967, p. 805.

(9) comments from the Government of Israel to the Basic Proposal;[75]

(10) comments from the Government of Italy to the Basic Proposal;[76]

(11) comments from the Government of Japan to the Basic Proposal;[77]

(12) comments from the Government of Portugal to the Basic Proposal;[78]

(13) comments from the Government of South Africa to the Basic Proposal;[79]

(14) comments from the Government of United Kingdom to the Basic Proposal;[80]

(15) comments from the Government of Luxembourg to the Basic Proposal;[81]

(16) excerpts of summary of observations of governments, prepared by the BIRPI Bureau, as regards Article 9;[82]

(17) amendment to the Basic Proposal, proposed by the Government of Austria;[83]

(18) amendment to the Basic Proposal, proposed by the Government of the United Kingdom;[84]

(19) amendment to the Basic Proposal, proposed by the Governments of Czechoslovakia, Hungary and Poland;[85]

(20) amendment to the Basic Proposal, proposed by the Government of Greece;[86]

(21) amendment to the Basic Proposal, proposed by the Government of Monaco;[87]

(22) amendment to the Basic Proposal, proposed by the Government of the Federal Republic of Germany;[88]

(23) amendment to the Basic Proposal, proposed by the Government of France;[89]

(24) amendment to the Basic Proposal, proposed by the Governments of Austria, Italy and Morocco;[90]

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[74] Source: Records 1967, p. 620.
[75] Source: Records 1967, p. 622.
[76] Source: Records 1967, p. 623.
[77] Source: Records 1967, p. 624.
[78] Source: Records 1967, p. 627.
[79] Source: Records 1967, p. 629.
[80] Source: Records 1967, p. 630.
[81] Source: Records 1967, p. 663.
[82] Source: Records 1967, pp. 669f.
[83] Source: Records 1967, p. 683.
[84] Source: Records 1967, p. 687.
[85] Source: Records 1967, p. 688.
[86] Source: Records 1967, p. 689.
[87] Source: Records 1967, p. 690.
[88] Source: Records 1967, p. 690.
[89] Source: Records 1967, p. 690.
[90] Source: Records 1967, p. 690.

(25) amendment to the Basic Proposal, proposed by the Government of India;[91]
(26) amendment to the Basic Proposal, proposed by the Government of Rumania;[92]

(27) amendment to the Basic Proposal, proposed by the Government of Japan;[93]

(28) amendment to the Basic Proposal, proposed by the Government of the Netherlands;[94]

(29) amendment to the Basic Proposal, proposed by the Government of India;[95]

(30) amendment to the Basic Proposal, proposed by the Working Group of Main Committee I;[96]

(31) text given to the Drafting Committee;[97]

(32) new text prepared for the Drafting Committee by the Secretariat;[98]

(33) Report of the Drafting Committee to Main Committee I;[99]

(34) final text submitted by the Drafting Committee to Main Committee I;[100]

(35) Additional Report of the Drafting Committee to Main Committee I;[101]

(36) additional text proposed by the Secretariat to the Drafting Committee;[102]

(37) additional text submitted by the Drafting Committee to Main Committee I;[103]

(38) excerpts from the Report of the Work of Main Committee I (Rapporteur Svante Bergström) relating to Article 9, including the general introduction,[104] and excerpts from the Records showing the corrections made in the Draft Report of the Committee;[105]

(39) excerpts of the Summary Minutes of Main Committee I;[106]

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[91] Source: Records 1967, pp. 690f.
[92] Source: Records 1967, p. 691.
[93] Source: Records 1967, p. 691.
[94] Source: Records 1967, p. 691.
[95] Source: Records 1967, p. 692.
[96] Source: Records 1967, p. 696.
[97] Source: Records 1967, p. 709.
[98] Source: Records 1967, p. 7eu08 T p. 696.

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(40) excerpts of the Summary Minutes of the Plenary of the Berne Union.[107]

22. The Diplomatic Conference for the Revision of the Berne Convention which took place in Paris from July 5 to 24, 1971, did not amend Article 9, and the Records of that Conference have therefore not been analyzed for this Note. Such an analysis can be provided if requested.

23. The request made by H.E. Mrs. Carmen Luz Guarda regarding Article 9(2) of the Berne Convention pertains to "any background information on the negotiation history of Article 9(2) and subsequent developments and practice concerning the provision." As regards material other than what is referred to in the preceding paragraphs, reference is made to the remarks made in paragraph 18, above.

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mechanical reproduction rights, several references are made to Article 9), 922f (discussion of Article 9 in the context of its application on translations), 926 to 928, 931.

[107] Source: Records 1967, pp. 804f.